their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

. . .

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

. . .

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction,

notwithstanding the residence or domicile of the child.

§ 1916. Return of custody

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

§ 1918. Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

Public Law 280 ("PL-280"), 18 U.S.C. § 1162 & 28 U.S.C. § 1360, provides in relevant part:

> **§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country**
>
> (a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:
>
> State or Territory of Indian country affected
>
State or Territory of:	Indian Country Affected:
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended

California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

§ 1360. State civil jurisdiction in actions to which Indians are parties

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of:	Indian Country Affected:
Alaska	All Indian country within the State
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation

Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

STATEMENT

The Ninth Circuit's decision in this case creates a split of authority over the interpretation of Public Law 280 ("PL-280"), 18 U.S.C. § 1162 & 28 U.S.C. § 1360, and threatens to abridge the historic right of Indian tribes in PL-280 states to determine for themselves who will raise Indian children living on Indian lands. The decision below holds that PL-280 deprives Indian tribes in PL-280 States of their exclusive jurisdiction to conduct involuntary child dependency proceedings regarding Indian children domiciled on the reservation. That decision not only contradicts the long-standing interpretation of PL-280 in at least two other jurisdictions, but also it directly undermines the Congressional policy of the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901-1963, which was enacted to preserve existing tribal sovereignty and give Tribes greater authority over custody matters regarding Indian children. *See Guidelines for State Courts,* 44 Fed. Reg. 67,584, 67,585-86 (1979) (explaining ICWA's goals of "keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Indian children who must be removed from their homes within their own families or Indian tribes."). Absent this Court's review, the Ninth Circuit's decision also threatens to unsettle the crucial boundary between "private civil" and "regulatory" matters articulated in this Court's own decisions interpreting PL-280, including *California* v. *Cabazon Band of Mission Indians,* 480 U.S. 202, 209 (1987) and *Bryan v. Itasca County*, 426 U.S. 373, 384-386 (1976).

Certiorari is proper not only to ensure uniform application of federal law but also to ensure faithful enforcement of federal legislation in this nationally sensitive area.

A. Factual Background

Petitioner Mary Doe is an enrolled member of the Elem Indian Colony and the biological mother of Jane Doe. Prior to the events that gave rise to this action, Jane was domiciled on the Elem reservation. As a person eligible for membership in the Tribe, Jane is a protected "Indian child" within the meaning of ICWA. *See* 25 U.S.C. § 1903(4).

The Elem Indian Colony is one of the four main villages that comprised the Southeastern Pomo Nation, a matriarchal society whose California history stretches back nearly 8,000 years. Before their lands were forcibly taken by the Europeans, the Pomo civilization populated, managed, and controlled over 2 million acres of land and waterways including 50 miles of lake shoreline. Today, having lost almost 99% of their aboriginal land, the Elem Indian Colony resides on a 50-acre reservation on which 80 of the Tribe's 250 members live.[1]

Petitioner was domiciled on the Reservation for over twenty years. Her daughter Jane was domiciled on the Reservation among her family and other tribal members from the time Jane was born until 1999, when the Lake County Department of Social Services ("DSS") removed her from the Tribe's Reservation over Petitioner's objection. The State initiated proceedings in Lake County Superior Court without Petitioner's participation that resulted in (1) Jane's placement in foster care, (2) the termination of Petitioner's parental rights, and (3) Jane's eventual adoption by non-tribal parents who were selected by the State court against the Tribe's wishes.

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[1] *See* http://www.elemnation.com/historeview.htm

B. Proceedings Below

In July 2002, Petitioner filed this action in federal district court challenging Respondents' conduct in the custody proceedings. Her First Claim for Relief alleged that Respondent Lake County Superior Court lacked subject matter jurisdiction over the underlying involuntary custody proceedings in violation of ICWA. Specifically, ICWA Section 1911(a) recognizes that jurisdiction over involuntary custody proceedings rests exclusively with the Tribe, and thus the State acted outside its authority.

Respondents moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), arguing *inter alia,* that PL-280 vests PL-280 States with jurisdiction over all child custody proceedings. Petitioner argued that exclusive tribal jurisdiction over involuntary child custody proceedings was not precluded by PL-280 because, as this Court has held, PL-280 grants PL-280 States civil jurisdiction only over disputes between private citizens, not over regulatory matters, *see Cabazon,* 480 U.S. at 209, and involuntary child custody proceedings are regulatory in nature. On September 29, 2003, the district court issued an order agreeing with Petitioner that involuntary child custody proceedings are regulatory in nature. App. 87a. The district court determined, however, that ICWA's statutory scheme and the regulations promulgated to enforce its provisions effectively divested the Tribe of its exclusive jurisdiction unless the Tribe affirmatively reassumed that authority. App 88a-90a. Petitioner took an interlocutory appeal of that ruling.

On appeal, the Ninth Circuit rejected the district court's grounds for originally dismissing petitioner's claim, but affirmed on other grounds. Specifically, the Ninth Circuit ruled that California's dependency proceedings were private civil/adjudicatory matters and not regulatory matters. In its view, "[a]t the heart of the dependency proceedings is a

dispute about the status of the child, a private individual." App. 48a. The Ninth Circuit reasoned that this was sufficiently analogous to a "private legal dispute[]" to keep the State's action outside the regulatory sphere and within PL-280's grant civil adjudicatory authority to PL-280 States. App. 49a.

Petitioner petitioned for rehearing en banc in the Ninth Circuit. That petition was denied on September 19, 2005.

REASONS FOR GRANTING THE PETITION

In holding that Public Law 280 deprives Indian tribes in PL-280 States such as California of their exclusive jurisdiction to conduct involuntary child dependency proceedings involving Indian children domiciled on the reservation, the Ninth Circuit created a split of authority with respect to the interaction between PL-280 and ICWA. The Ninth Circuit's ruling also conflicts with *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987) and *Bryan v. Itasca County*, 426 U.S. 373, 384-386 (1976) – this Court's well-settled precedents concerning the scope of PL-280, and violates the bedrock "Indian canon" of construction that statutes affecting Indian tribes must, where ambiguous, be read in a manner that protects tribal sovereignty. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44, (1980) ("Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence."). The decision also thwarts Congress' purpose in enacting ICWA – to promote the stability and security of Indian tribes and families," *see* 25 U.S.C. § 1902, and to reduce the "alarmingly high percentage of Indian families broken up by the removal, often unwarranted, of their children from them by [the State] and

[the] alarmingly high percentage of such children . . . placed in non-Indian . . . homes." *See* 25 U.S.C. § 1901.

The proper treatment of custody proceedings for Indian children is an issue of national importance deserving of this Court's attention. The Ninth Circuit's opinion wrongly strips from Tribes in PL-280 States a core aspect of tribal sovereignty, leaving custody proceedings in the hands of States with a documented record of failing to promote ICWA's purposes.

I. THE NINTH CIRCUIT'S DECISION CREATES A SPLIT OF AUTHORITY OVER WHETHER PUBLIC LAW 280 DEPRIVES INDIAN TRIBES IN PL-280 STATES OF THEIR EXCLUSIVE JURISDICTION TO CONDUCT INVOLUNTARY CHILD DEPENDENCY PROCEEDINGS INVOLVING INDIAN CHILDREN DOMICILED ON THE RESERVATION.

The Ninth Circuit held that PL-280 deprives Indian tribes of a fundamental sovereign right: to assume *sole* responsibility for assessing when the best interests of a child tribal member domiciled on tribal land requires the tribe to remove her from her family environment or otherwise involve itself in her rearing. In so holding, the Ninth Circuit created a direct conflict with prevailing law in Wisconsin and Iowa regarding Indian child custody.

Wisconsin's position on the interaction between PL-280 and ICWA has remained unchanged since 1981, when the Wisconsin Attorney General considered the precise issue considered by the Ninth Circuit in this case: whether PL-280, notwithstanding ICWA, confers state jurisdiction over both voluntary and involuntary child custody proceedings. 70 Op. Atty Gen. Wis. 237 (1981), 1981 Wisc. AG Lexis 7, *7. Wisconsin's Attorney General flatly denied that PL-280 does

so, explaining that the involuntary termination of parental rights "involve[s] some aspect of the state's regulatory jurisdiction. . . . By comparison, where the proceeding is not between the state and an individual, but rather primarily involves only private persons as in a voluntary foster care placement, state law may be applied under Pub. L. No. 280's jurisdictional grant." *Id.* Wisconsin, like the vast majority of other PL-280 States thus for decades has recognized the inherent and exclusive right of tribes to conduct these proceedings.[2]

The Iowa Supreme Court applied the same analysis and reached the same result in circumstances that are nearly identical to those raised here. At issue in *State ex rel. Department of Human Services as Next Friend to Whitebreast v. Whitebreast* was whether the State, which had assumed PL-280 jurisdiction over the Sac and Fox reservation, could institute a state court action to recover child support from a

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[2] The Ninth Circuit's assertion that Washington and Idaho have "considered the interplay between Public Law 280 and a state's authority to enforce child dependency laws in Indian country," App. 32a, is somewhat misleading. Though Washington and Idaho have statutes on the books claiming authority to implement child dependency laws, *see* Wash. Rev. Code § 37.12.010(7); Idaho Code § 67-5101(c), there is no evidence that either legislature considered the distinction between voluntary and involuntary proceedings in enacting these laws, and in any event these laws were uninformed by *Bryan v. Itasca County*, 426 U.S. 373, 388 (1976), which was issued 13 years after their enactment and which set out the proper analytic framework for assessing the extent of state civil jurisdiction under PL-280. By contrast, the Wisconsin Attorney General's 1981 opinion involved an actual analysis of the law in light of *Bryan* and ICWA, both of which are cited in that opinion. Moreover, Washington has not relied on Wash. Rev. Code § 37.12.010(7) to assert jurisdiction but has instead given tribes "exclusive jurisdiction over all issues relating to 'child dependency.'" *Confederated Tribes of Colville Reservation v. Superior Court*, 945 F.2d 1138, 1140 n.3 (9th Cir. 1991); *see also Navajo Nation v. Superior Court*, 47 F. Supp. 2d 1233, 1245 (E.D. Wash. 1999).

tribal member residing on the reservation after the state Department of Human Services had advanced support funds to the member's former wife. 409 N.W.2d 460, 460-62 (Iowa 1987). Finding itself "bound to apply the standard set by the United States Supreme Court in *Bryan*," *id.* at 464, the court disapproved of the State's exercise of jurisdiction:

> [I]f this were a truly private cause of action brought by one Indian to enforce a support order against another . . . we would not decline to adjudicate the merits of the controversy. . . .
>
> But the public character [of the legislative scheme authorizing child support recovery] . . . seems to us inescapable.

Id. at 463. Even though Iowa's law equated the rights of the Department with the rights of the children in need of support – indeed, it said the agency "[stood] in the shoes of the minor child" – the court held that "the status of the agency as a public body, exercising the state's duty as parens patriae is never abandoned." *Id.* (internal quotation omitted).

The Ninth Circuit's reasoning in this case directly conflicts with the Iowa Supreme Court's analysis in *Whitebreast*. Like the Iowa agency, Respondent County DSS initiated involuntary proceedings against Petitioner in state court, carrying out "duties . . . defined and shaped by a host of administrative regulations" and legislative requirements. *Id.* In doing so, the DSS never abandoned the State's "parens patriae interest in preserving and promoting the welfare of the child," *Cynthia D. v. Superior Court*, 851 P.2d 1307, 1312 (Cal. 1993). When the Ninth Circuit nevertheless failed to follow "the standard set by [this] Court in *Bryan*," *Whitebreast*, 409 N.W. 2d at 464, the Ninth Circuit created a clear split with the Iowa Supreme Court.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S WELL-SETTLED INDIAN LAW PRECEDENTS.

A. The Ninth Circuit's Decision Directly Contravenes this Court's Decisions Concerning the Scope of Public Law 280.

Despite the fact that PL-280 vests States with only limited civil jurisdiction and not "the full panoply of civil regulatory powers," *Bryan*, 426 U.S. at 388, the Ninth Circuit held that it deprived affected tribes of not only their exclusive jurisdiction to conduct private child custody proceedings (*e.g.*, voluntary adoptions between private parties), but also their exclusive sovereign jurisdiction to institute involuntary proceedings in the best interest of their children (*e.g.*, to remove an Indian child from her Indian home and either reunify the child with her parents or terminate the parental relationship and place the child with more appropriate guardians). This interpretation of PL-280 cannot be squared with this Court's settled precedents.

This Court's decisions in *Bryan* and *Cabazon* specifically address the limited scope of a State's civil authority under PL-280. In *Bryan*, this Court held that PL-280 extended state jurisdiction only to "*private* legal disputes between reservation Indians, and between Indians *and other private citizens*" – that is, "over *private* civil litigation involving reservation Indians in state court" – but did not confer "general state civil regulatory control over Indian reservations." 426 U.S. at 383, 385, 384 (emphasis added) (holding Minnesota lacked jurisdiction to tax an Indian's mobile home located on his tribe's reservation). In *Cabazon* this Court concluded that California could not apply its gambling laws to Indian tribes because (although some forms of gambling were unlawful, and some gambling disputes were

private) the State's gambling restrictions were regulatory in nature whenever the State was prohibiting certain forms of generally permitted conduct. This Court reiterated that a law that is "civil in nature . . . [is] applicable only as it may be relevant to private civil litigation in state court." 480 U.S. at 208. "[I]f the state law generally permits the conduct at issue, subject to regulation, *it must be classified as civil/regulatory* and Pub. L. 280 does not authorize its enforcement on an Indian reservation." *Id.* at 209 (emphasis added).

The Ninth Circuit's decision directly contravened these precedents. As a preliminary matter, the State is not a private citizen, and its assertion of jurisdiction over Jane Doe pursuant to sections 300(b) and (d) of the Welfare and Institutions Code ("WIC") removes its actions from the permissible realm of "private legal disputes . . . between Indians and other private citizens." *Bryan*, 426 U.S. at 383. Moreover, even if there are circumstances in which litigation maintains its private character despite the State's involvement as a litigant, those are not present here. As California's welfare code shows, and the district court found, the State exercises civil *regulatory* power in involuntary custody proceedings. The State's purpose in enacting the WIC is explicitly regulatory: "the preservation of the family as well as the safety, protection, and physical and emotional well-being of the child." Cal. Wel. & Inst. Code § 300.2. Indeed, in this case, the DSS's activities under WIC were clearly regulatory in nature: removing Jane from the reservation, referring her to the juvenile court, petitioning to have her declared a dependent, placing her in foster care, terminating her mother's parental rights, and placing her up for adoption.

The State's actions were not those of a private litigant, but of a public body ensuring the welfare of a citizen. *See* App. 87a. Each step of the way, the State in this case – whether acting through the DSS or the state court – was mandated by

statute to assess Jane's best interests and the possibility of preserving her family relationships. For example, section 358 of the WIC requires the social worker assigned to dependency proceedings to file a report with the court addressing:

> the likelihood that child protective services might solve the problems and whether these services have been offered to qualified parents;
>
> the recommended plan for returning the child to her parents, and the alternatives if reunification fails;
>
> whether the child's best interests would be served by granting visitation rights to the grandparents; and
>
> the appropriateness of maintaining the child's relationships with her siblings.

Cal. Wel. & Inst. Code § 358.1(a)-(c) & (d)(1)(B). Similarly, when a court orders a hearing to decide whether to terminate parental rights, *id.* § 366.26, the court must assess a host of factors, including:

> the "amount of and nature" of contact between the child and her parents and extended family;
>
> the "child's medical, developmental, scholastic, mental, and emotional status;"
>
> the eligibility of and the child's relationship to prospective adoptive parents;
>
> the likelihood that the child would be adopted if her parent's rights are terminated.

Id. § 361.5(g); *see also id.* § 361.5(b) (setting out criteria for determining whether reunification services should be provided to a parent or guardian).

These provisions demonstrate, contrary to the Ninth Circuit's judgment, that child custody proceedings involve far

more than a discrete adjudication of a child's "status." *See* App. 51a-52a. Rather, the dependency determination is but one step in an elaborate regulatory effort to determine how best to respond to circumstances that may threaten a child's well-being and jeopardize her family relationships. Imposing these types of regulations, which reflect state policy determinations, upon a tribe threatens to undermine tribal governance, contravening this Court's precedent by reducing tribes to "little more than private, voluntary organizations." *Bryan*, 426 U.S. at 388 (quotations omitted). As this Court has made clear, PL-280 does not confer such authority on States.

B. The Ninth Circuit's Decision Also Violates the Bedrock "Indian Canon" of Construction that Statutes Affecting Indian Tribes Must, Where Ambiguous, Be Read To Protect Tribal Sovereignty.

The Ninth Circuit's decision also violates the "eminently sound and vital canon" that "statutes passed for the benefit of . . . Indian tribes . . . are to be liberally construed," resolving ambiguities "in favor of the Indians." *Bryan*, 426 U.S. at 392 (quotations omitted); *see also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44, (1980) ("Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence."). Here, the Ninth Circuit expressly acknowledged the uncertain application of PL-280 to California's child dependency statute, conceding: "California's child dependency statute may not fit neatly into any of the Public Law 280 jurisdictional boxes [meaning criminal prohibitory, civil regulatory, or civil adjudicatory]," App. 25a. The Ninth Circuit violated this Court's precedents by failing to resolve that ambiguity regarding PL 280's application in favor of the

tribe's jurisdiction.

III. THE NINTH CIRCUIT'S DECISION MISINTERPRETS THE INDIAN CHILD WELFARE ACT AND THWARTS THE PURPOSES BEHIND IT.

In support of its conclusion that PL-280 gives States civil jurisdiction over all child dependency proceedings – voluntary and involuntary alike – the Ninth Circuit pointed to the text, structure, and "backdrop" of ICWA." App. 53a. But ICWA was clearly intended to preserve the exclusive jurisdiction of all Tribes' (PL-280 and non-PL-280 alike) over involuntary custody proceedings. So putting aside the appropriateness of using one statute (ICWA) to interpret the meaning of a different statute (PL 280) passed 25 years earlier, rather than supporting the Ninth Circuit's decision, ICWA's language and legislative history directly contradict, rather than support, the Ninth Circuit's decision.

A. The Ninth Circuit's Reasoning is Undermined by ICWA's Text.

ICWA refers to PL-280 in two places. First, in section 1911, it provides in part:

> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law.

25 U.S.C. § 1911(a). The "existing Federal law" language clearly includes PL-280. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 42 n.16 (1989). Second, ICWA refers to PL-280 in the section addressing reassumption: "Any Indian tribe which became subject to

State jurisdiction pursuant to [PL-280], or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings."[3] 25 U.S.C. § 1918. The natural reading of these two provisions is: (1) Indian tribes have exclusive jurisdiction over custody proceedings involving Indian children except where PL-280 vests the States with concurrent jurisdiction over any subset of custody proceedings [§ 1911(a)]; and (2) affected tribes may petition the Department of the Interior to reassume whatever jurisdiction over custody proceedings PL-280 has extended to the States [§ 1918] (thereby putting themselves on the same footing as tribes in non-PL-280 States, whose exclusive jurisdiction is recognized in section 1911(a)).

ICWA's text thus merely maintains the *existing* federal law regarding child custody proceedings and gives tribes in PL-280 States a method of reassuming exclusive jurisdiction over those aspects of child custody (*i.e.*, *private* proceedings affecting custody) made concurrent by PL-280. Nevertheless, the Ninth Circuit erroneously assumed that a State's jurisdiction over *any* child custody proceedings under PL-280 necessarily entails jurisdiction over *all* custody proceedings – voluntary and involuntary. Based on this flawed premise, the Ninth Circuit reasoned:

> It would be illogical to give exclusive jurisdiction back to the tribes under § 1918(a) if such jurisdiction were not part of the exception under § 1911(a).

App. 54a. However, it is only the Ninth Circuit's assumption of an all-or-nothing grant of jurisdiction that is illogical. ICWA, passed two years after *Bryan*, merely reflects that States have civil jurisdiction over *some* but not all custody

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[3] ICWA defines "child custody proceeding" in 25 U.S.C. § 1903(1).

proceedings – namely, voluntary proceedings – and section 1918 provides for reassumption over that subset of matters.

ICWA was passed specifically "to promote the stability and security of Indian tribes and families" by *curtailing* state involvement in Indian child custody proceedings. *See* 25 U.S.C. § 1902; *see also id.* § 1901. It would have been perverse for Congress *sub silentio* to alter the common understanding of *Bryan* such that PL-280 States would have a broader license to remove Indian children from their homes. *Cf. Cook County, Illinois v. United States ex rel. Chandler*, 538 U.S. 119, 133-34 (2003) ("It is simply not plausible that Congress intended to repeal municipal liability *sub silentio* by the very Act it passed to strengthen the Government's hand in fighting false claims."). The Ninth Circuit's determination that Congress did so fundamentally undermines the ICWA's purposes.

B. The Ninth Circuit Ignored the Relevant Legislative History of ICWA.

That ICWA maintained existing federal law regarding child custody proceedings and gave tribes in PL-280 States a method of reassuming exclusive jurisdiction over those aspects of child custody (*i.e., private* voluntary proceedings affecting custody) made concurrent by PL-280 is confirmed by ICWA's legislative history, the relevant aspects of which were ignored in the Ninth Circuit's opinion.

Numerous passages from the legislative record emphasize that Congress did not intend ICWA to affect, let alone broaden, PL-280's reach. For example, the Report from the Senate's Select Committee on Indian Affairs stated unequivocally: "Nothing in this Act shall be construed to either enlarge or diminish the jurisdiction over child welfare matters which may be exercised by either State or tribal courts or agencies except as expressly provided in this Act."

S. Rep. No. 95-597, at 6 (Nov. 3, 1977). "To the extent the act provides for jurisdictional division between States and tribes, it is declarative of law as developed by judicial decision." *Id.* at 10. Likewise, the House Report states, with respect to section 1911: "The provisions on exclusive tribal jurisdiction confirms [*sic*] the developing Federal and State case law holding that the tribe has exclusive jurisdiction when the child is residing or domiciled on the reservation." H.R. Rep. No. 95-1386, at 21 (July 24, 1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7543-44; *see also* 124 Cong. Rec. H38,108 (daily ed. Oct. 14, 1978) (statement of Rep. Lagomarsino) ("[S]ection [1911(a)] . . . states existing law with respect to tribal jurisdiction.").

If ICWA's language and legislative history have anything to say about the question presented by this case, it is that Congress did not intend through ICWA to alter the scope of PL-280 as it existed prior to ICWA's passage, and subject to this Court's interpretation in *Bryan*.

IV. THE PROPER TREATMENT OF CUSTODY PROCEEDINGS FOR INDIAN CHILDREN IS AN ISSUE OF NATIONAL IMPORTANCE DESERVING OF THIS COURT'S ATTENTION.

The question of who has jurisdiction over custody proceedings involving Indian children is one of national importance. A review of cases in PL-280 States reveals that PL-280 State courts consistently fail to apply the safeguards of ICWA *See, e.g., In re I.G.*, 35 Cal. Rptr. 3d 427, 432-33 (Cal. 2005) (criticizing courts for repeatedly failing to properly apply ICWA) *In re: T.D. and D.D. v. Dept. of Children and Fam. Services,* 890 So.2d 473, 475 (Fla. 2004) (holding that ICWA was not adequately invoked in termination of parental rights proceeding and noting that "had its procedures been properly followed, the great expenditure

of scarce judicial resources . . . could have been avoided."); *In re: R.E.K.F.*, 698 N.W.2d 147, 150 (Iowa 2005) (holding State failed to adequately comply with the notice provisions of the Iowa ICWA); *In re Phoebe S. and Rebekah S. v. Regina S.*, 664 N.W.2d 470 (Neb. 2003) (holding that the State had not met ICWA's heightened "beyond a reasonable doubt" standard sufficient to terminate mother's parental rights); *State ex. rel. Juvenile Dept. of Lane County v. Shuey*, 850 P.2d 378, 381 (Or. 1993) (remanding on basis that ICWA required trial court to grant tribe's motion to intervene); *In re Dependency of T.L.G.*, 108 P.3d 156, 162 (Wash. 2005) (holding that trial court erred in failing to ensure that notice of termination proceedings was given to the tribe or the BIA). Indeed, a California appeals court recently complained of a "virtual epidemic of cases where reversals have been required because of noncompliance with ICWA" by juvenile courts and social service agencies. *In re I.G.*, 35 Cal. Rptr. 3d at 432-33. The appeals court noted that in addition to dozens of published cases, there were "72 unpublished cases statewide in this year alone reversing, in whole or in part, because of noncompliance with ICWA." *Id.*

Given state courts' poor record of compliance with ICWA, who has jurisdiction over custody proceedings involving Indian children is a matter of great significance. It is evident from the actions of the juvenile court and social services agency in this case and from myriad other state court cases that PL-280 States routinely fail to adhere to the provisions of ICWA. As a result, thousands of Indian children are permanently removed from their Indian families and from their tribal communities in spite of Congress' clear efforts, through ICWA, to preserve the unity of Indian families. As Congress noted in passing ICWA, however, "there can be no greater threat to 'essential tribal relations,' and no greater infringement on the right of the . . . tribe to govern themselves

than to interfere with tribal control over the custody of their children." H.R. REP. NO. 95-1386, at 14-15.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 2005

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JULY 19, 2005

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-15477

D.C. No.
CV-02-03448-MHP

MARY DOE,

Plaintiff-Appellant,

v.

ARTHUR MANN, in his official capacity; ROBERT L. CRONE, JR., in his official capacity; LAKE COUNTY SUPERIOR COURT; DEPARTMENT OF SOCIAL SERVICES, LAKE COUNTY; D., Mrs.; D., Mr.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of California; Marilyn H. Patel, District Judge, Presiding

Argued and Submitted
October 6, 2004—San Francisco, California

Filed July 19, 2005

Appendix A

Before: TROTT, MCKEOWN, Circuit Judges, and SHADUR, Senior District Judge.*

Opinion by Judge McKeown

OPINION

MCKEOWN, Circuit Judge.

Mary Doe[1] challenges the State of California's jurisdiction to terminate her parental rights over her Indian child, Jane Doe, who was domiciled on the Elem Indian Colony reservation at the time she was removed from Mary Doe's custody by the Lake County Department of Social Services. The case arises under the Indian Child Welfare Act ("ICWA"), which was passed in 1978 to ensure the tribes a role in adjudicating child custody proceedings involving Indian children. P.L. 95-608, codified at 25 U.S.C. §§ 1901-1963.[2] ICWA provides that tribes will have exclusive jurisdiction over child custody proceedings involving Indian children domiciled or residing on the reservation "except where such jurisdiction is otherwise vested in the State by *existing Federal law.*" 25 U.S.C. § 1911(a) (emphasis added). Under one such federal law, 18 U.S.C. § 1162(a) and

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* The Honorable Milton I. Shadur, United States Senior District Judge for the Northern District of Illinois, sitting by designation.

1. Pseudonyms are used to identify the mother, child, and adoptive parents.

2. All references to the U.S.Code are to Title 25 unless otherwise indicated.

28 U.S.C. § 1360(a), commonly known as "Public Law 280," California is vested with broad criminal and certain civil jurisdiction over Indians.

This case presents an issue of first impression for the federal courts, requiring us to reconcile Public Law 280's grant of certain jurisdiction to the state of California over Indians with the exclusive jurisdiction granted to tribes by ICWA over child custody proceedings involving Indian children domiciled on Indian reservations.

As a threshold matter, we conclude that the federal court has jurisdiction under 28 U.S.C. § 1331 and, in conjunction with ICWA, may use that jurisdiction to review the state court judgment terminating Mary Doe's parental rights; the *Rooker-Feldman* doctrine did not bar the district court from exercising jurisdiction. On the merits, we conclude that ICWA does not provide the Elem Indian Colony with exclusive jurisdiction over this child dependency proceeding involving Jane Doe, an Indian child. Consequently, we affirm the district court's entry of judgment in favor of the State of California.

I. Factual and Procedural Background

Mary Doe is a member of the federally recognized Elem Indian Colony in Lake County, California.[3] In 1999, Jane

3. Mary Doe submitted a motion to strike portions of the Supplemental Excerpts of Record because most of the documents were state court records that were not included in the district court record. The motion to strike is granted. *See* Fed. R.App. P. 10(a)(1); (Cont'd)

told her mother that a minor male cousin had sexually assaulted her. Mary Doe called the Department of Social Services, and the agency responded by removing Jane from her great-aunt's home on the Elem Indian Colony's reservation, where Jane was residing at the time.

The Department of Social Services initiated child dependency proceedings in Lake County Superior Court under California's Welfare and Institutions Code ("Cal. Welf. & Inst.Code") §§ 300(b) and (d) based on Mary Doe's failure to protect her daughter. Jane was placed in a licensed foster home while the state dependency proceedings were pending in state superior court. In the fall of 2000, the Elem Indian Colony intervened in the superior court proceedings. At the same time, the Tribal Council passed a resolution declaring that Jane should be placed for adoption with Mary Doe's brother and her sister-in-law.

The superior court terminated Mary Doe's parental rights in 2001. Jane's foster parents, Mr. and Mrs. D, petitioned to adopt her. Mrs. D is an Indian but not a member of the Elem Indian Colony. Despite the Elem Indian Colony's resolution, the superior court approved the adoption by Mr. and Mrs. D. The petition for adoption stated that Jane was an Indian child under ICWA and was affiliated with the Elem Indian Colony.

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9th Cir. R. 10-2(b). We do, however, take judicial notice of the following records from the state court proceedings: 1) Orders Under Section 366.26 of the Welfare and Institutions Code, which establish that Mary Doe's parental rights were terminated on February 16, 2001; 2) Petition for Adoption; 3) Attachment to Petition for Adoption—Adoption of an Indian Child; 4) Order of Adoption; and 5) Juvenile Dependency Petition.

Appendix A

A year and a half after her parental rights were terminated, Mary Doe filed a complaint in federal court for declaratory and injunctive relief. Among other claims, Mary Doe challenged the superior court's jurisdiction to terminate her parental rights and to approve Jane's adoption by Mr. and Mrs. D. Mary Doe named as defendants two Superior Court Judges and the Superior Court (collectively "Court-Appellees"), Mr. and Mrs. D, and the Department of Social Services.

The district court held that the *Rooker-Feldman* doctrine did not bar it from exercising subject matter jurisdiction over Mary Doe's complaint because § 1914 provides a cause of action in federal court to invalidate certain state court child custody proceedings. *Doe v. Mann,* 285 F.Supp.2d 1229, 1233-34 (N.D.Cal.2003). Applying its jurisdiction, the district court held that, because the Elem Indian Colony did not have exclusive jurisdiction over child dependency proceedings under § 1911(a), the superior court had jurisdiction to terminate Mary Doe's parental rights and approve Jane's adoption. *Id.* at 1238-39. The district court entered a final judgment against Mary Doe, thus leaving intact the state court parental termination and adoption orders.

II. JURISDICTION

Mary Doe's district court complaint asserted that the state judges and "the Superior Court erroneously deprived [Mary Doe] of custody of [Jane] without jurisdiction." Invoking § 1914,[4] which provides that a parent "may petition any court

4. Section 1914, codified at 25 U.S.C. § 1914, provides:

> Any Indian child who is the subject of any action for foster care placement or termination of parental rights

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of competent jurisdiction to invalidate" a parental rights termination order, Mary Doe sought a declaration that the state court judgments terminating Mary Doe's parental rights and approving the adoption of Jane were null and void for lack of jurisdiction under ICWA. Mary Doe contended that § 1911(a) provides the Elem Indian Colony exclusive jurisdiction over Jane's dependency proceedings because Jane was domiciled within Indian country at the time dependency proceedings commenced.

Typically, the *Rooker-Feldman* doctrine bars federal courts from exercising subject-matter jurisdiction over a proceeding in "which a party losing in state court" seeks "what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." *Johnson v. De Grandy,* 512 U.S. 997, 1005-06, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). The nature of Mary Doe's federal complaint falls squarely within the confines of a "de facto appeal" of a state court judgment that would be outside the subject-matter jurisdiction of the federal district court under the *Rooker-Feldman* doctrine. *See Noel v. Hall,* 341 F.3d 1148, 1156 (9th Cir.2003) (federal district court must refuse to hear "a forbidden de facto appeal from

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> under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 101, 102, and 103 of this Act [25 U.S.C. §§ 1911, 1912, and 1913].

a judicial decision of a state court"). We ultimately conclude, however, that the federal district court had jurisdiction to consider Mary Doe's complaint because the federal district court had federal question jurisdiction over Mary Doe's claims, and § 1914 grants federal district courts the authority to invalidate state court actions that violate §§ 1911, 1912, and 1913.

A. *Rooker-Feldman* Doctrine

The *Rooker-Feldman* doctrine derives its name from two Supreme Court cases: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). In simple terms, "[u]nder *Rooker-Feldman*, a federal district court is without subject matter jurisdiction to hear an appeal from the judgment of a state court." *Bianchi v. Rylaarsdam*, 334 F.3d 895, 896(9th Cir.2003).

The Supreme Court has applied the doctrine only three times, in the named cases and, just this year, in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, where it emphasized the narrow scope of the doctrine:

> The *Rooker-Feldman* doctrine . . . is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.

> *Rooker-Feldman* does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court activities.

125 S.Ct. 1517, 1521-22, 161 L.Ed.2d 454 (2005).[5] Our earlier precedent is consistent. As we explained in *Noel v. Hall,*

> [a] federal district court dealing with a suit that is, in part, a forbidden de facto appeal from a judicial decision of a state court must refuse to hear the forbidden appeal. As part of that refusal, it must also refuse to decide any issue raised in the suit that is "inextricably intertwined" with an issue resolved by the state court in its judicial decision.

341 F.3d at 1158.

Mary Doe first tries to sidestep *Rooker-Feldman* on the theory that state court jurisdiction under § 1911(a) was not raised and litigated in Lake County Superior Court, thus preventing Mary Doe's federal complaint from being characterized as a de facto appeal. Rather than ask the federal

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5. We note that the Court-Appellees did not raise preclusion principles on appeal, and the Department of Social Services raised preclusion principles in only one sentence of its brief. As a result, we leave for another case the relationship between § 1914 and the Full Faith and Credit Act, 28 U.S.C. § 1738, and the principles of res judicata and collateral estoppel.

district court to reconsider the substance of the state court orders to terminate Mary Doe's parental rights and approve the adoption of Jane, Mary Doe contends the complaint presents a new jurisdictional issue. We are not persuaded.

Although the ICWA jurisdictional issue was not raised in the state court proceedings, Mary Doe's federal claim is still a de facto appeal of a state court judgment, and the jurisdictional issue raised by Mary Doe is inextricably intertwined with the state court's judgment. *See Noel,* 341 F.3d at 1158. Indeed, while not explicitly addressed in the state court's rulings terminating Mary Doe's parental rights and approving Jane's adoption, the state court necessarily must have concluded it had jurisdiction pursuant to ICWA and Public Law 280 to make those decisions.[6] Thus, the fact that Mary Doe now challenges the state court's jurisdiction under ICWA does not change our initial *Rooker-Feldman* calculus. Mary Doe requests that we "undo" a prior state court judgment, which is another way of presenting a federal district court with a de facto appeal that bars subject-matter

6. *Rooker-Feldman* applies where the plaintiff in federal court claims that the state court did not have jurisdiction to render a judgment. *See Olson Farms, Inc. v. Barbosa,* 134 F.3d 933, 936 (9th Cir.1998) (*Rooker-Feldman* bars subject-matter jurisdiction over federal claim challenging determinations of the California Agricultural Labor Relations Board and California state courts that they had jurisdiction over Olson Farms under the California Agricultural Labor Relations Act); *MacKay v. Pfeil,* 827 F.2d 540, 545 (9th Cir.1987) (*Rooker-Feldman* bars subject-matter jurisdiction over federal claim that Alaska Superior Court wrongly found it had personal jurisdiction over plaintiff); *Schmitt v. Schmitt,* 324 F.3d 484, 487 (7th Cir.2003) (*Rooker-Feldman* bars subject-matter jurisdiction over federal claim that state court lacked personal jurisdiction).

jurisdiction under the *Rooker-Feldman* doctrine. *See Bianchi*, 334 F.3d at 900 ("Stated plainly, '*Rooker-Feldman* bars any suit that seeks to disrupt that seeks to disrupt or 'undo' a prior state-court judgment, regardless of whether the state-court proceeding afforded the federal-court plaintiff a full and fair opportunity to litigate her claims.'") (citations omitted).

Our conclusion that Mary Doe's case falls within the traditional boundaries of the *Rooker-Feldman* doctrine is but one piece of the jurisdictional puzzle. We next consider whether Congress, in enacting ICWA, provided federal courts authority to invalidate state court actions in the narrow area of child custody proceedings involving Indian children. If so, *Rooker-Feldman* would not preclude federal jurisdiction. Before turning to ICWA, we consider other circumstances in which Congress authorized federal courts to review state court judgments.

B. Congressional Grants of Authority to Review State Court Judgments

The Constitution does not command the *Rooker-Feldman* doctrine. *In re Gruntz*, 202 F.3d 1074, 1078 (9th Cir.2000) (en banc) ("*Rooker-Feldman* is not a constitutional doctrine. Rather, the doctrine arises out of a pair of negative inferences drawn from two statutes. . . ."). As a result, Congress may authorize federal district courts to review state court judgments. *Id.* at 1079(*Rooker-Feldman* must be considered in the context of "the entire federal jurisdictional constellation," including congressional grants of authority to review state-court decisions in certain cases). Federal

statutes that permit federal courts to review state court judgments are rare but obvious[7] Two examples, habeas corpus and bankruptcy jurisdiction, are often referred to as "exceptions" to *Rooker-Feldman*. As we explained in *Noel*,

> the principle that there should be no appellate review of state court judgments by federal trial courts has two particularly notable statutory exceptions: First, a federal district court has original jurisdiction to entertain petitions for habeas corpus brought by state prisoners who claim that the state court has made an error of federal law. Second, a federal bankruptcy court

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7. Courts have been loath to recognize statutory authorizations to review state court judgments. *See, e.g., Dale v. Moore,* 121 F.3d 624, 627 (11th Cir.1997) (holding the Americans With Disabilities Act "does not provide an independent source of federal court jurisdiction that overrides the application of the *Rooker-Feldman* doctrine" even though the ADA subjects state public entities to the terms of the act); *Ritter v. Ross,* 992 F.2d 750, 753, 755 (7th Cir.1993) (applying *Rooker-Feldman* to bar § 1983 suit claiming state foreclosure proceeding was a deprivation of property without due process, but noting that *Rooker-Feldman* " 'simply forbids federal district court appellate review of state court judgments in the guise of collateral attacks when no federal statute authorizes such review' ") (quoting James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity,* 92 Colum. L.Rev.1997, 2008 n. 46 (1992)); *Johnson v. Kansas,* 888 F.Supp. 1073, 1080 (D.Kan.1995), *aff'd,* 1996 U.S.App. LEXIS 6598 (10th Cir.1996) ("The only exception to ... the *Rooker-Feldman* doctrine, is where a federal statute authorizes federal appellate review of final state court decisions.") (alteration in original) (internal quotations and citations omitted).

> has original jurisdiction under which it is empowered to avoid state judgments, to modify them, and to discharge them.

341 F.3d at 1155 (internal citations and quotations omitted). In both instances, the statutes reflect clear congressional grants of authority.

Another useful example of an explicit grant of authority for federal courts to invalidate state court judgments is the implementing legislation of the Hague Convention. The statute, the International Child Abduction Remedies Act ("ICARA"), provides that state and federal courts have concurrent original jurisdiction over actions arising under the Hague Convention. 42 U.S.C. § 11603(a). We have interpreted this provision of ICARA to provide federal district courts the authority to vacate state custodial decrees that violate the Hague Convention:

> In this case, Congress has expressly granted the federal courts jurisdiction to vindicate rights arising under the Convention. *See* 42 U.S.C. § 11603(a). Thus, federal courts must have the power to vacate state custody determinations and other state court orders that contravene the treaty.

Mozes v. Mozes, 239 F.3d 1067, 1085 n. 55 (9th Cir.2001).

Whether characterized as exceptions to *Rooker-Feldman* or as specific grants of authority, these three examples underscore that Congress may by statute grant federal courts authority to review certain state court judgments.

C. ICWA § 1914—Authority To Invalidate State Court Actions

The question we now consider is whether § 1914 is a grant of authority to the federal courts to invalidate certain state court child custody proceedings that counteracts the *Rooker-Feldman* doctrine. Section 1914 provides:

> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe *may petition any court of competent jurisdiction to invalidate such action* upon a showing that such action violated any provision of sections 101, 102, and 103 of this Act [25 U.S.C. §§ 1911, 1912, and 1913].

25 U.S.C. § 1914 (emphasis added). Federal cases that have interpreted § 1914 are few and far between, and no case has analyzed § 1914 in the jurisdictional context or in relation to the *Rooker-Feldman* doctrine.[8]

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8. Court-Appellees argue that *Confederated Tribes of the Colville Reservation v. Superior Court*, 945 F.2d 1138 (9th Cir.1991), demonstrates that § 1914 does not provide an exception to *Rooker-Feldman*. This case is not germane to our inquiry, however, because it involved a parent-to-parent custody dispute that was not covered under ICWA. *Id.* at 1140 n. 3. ("As the district court made clear, the question of the Tribes' exclusive jurisdiction under the ICWA became a 'non-issue.'"). Although the Tenth Circuit has construed § 1914 in

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Appendix A

The district court held, by a process of elimination, that § 1914 granted it authority to review the state court judgment:

> [B]y a process of elimination, a "court of competent jurisdiction" must include inferior federal courts, or the provision is meaningless. If the section only referred to state appellate courts, there would be no need for Congress to create this cause of action; Doe already has the right to appeal an adverse decision to California's higher courts. It is highly unlikely that the provision grants tribal courts the power to invalidate state court judgments.
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> . . . .
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> This court finds that section 1914 grants federal courts the power to review state custody proceedings such as those here; therefore, the

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the context of res judicata, collateral estoppel, declaratory judgment actions, and *Younger* abstention, none of the cases considered *Rooker-Feldman* principles in conjunction with challenges to compliance with ICWA. *See Kiowa Tribe of Okla. v. Lewis*, 777 F.2d 587, 590 (10th Cir.1985) (res judicata prevented the tribe from relitigating claims in federal court where the state court denied the tribe the right to intervene in child custody proceeding); *Morrow v. Winslow*, 94 F.3d 1386, 1390 (10th Cir.1996) (no consideration of *Rooker-Feldman* in the context of § 1914 because *Younger* abstention prevented an injunction of ongoing state custody proceeding); *Comanche Indian Tribe of Okla. v. Hovis*, 53 F.3d 298, 304 (10th Cir.1995) (collateral estoppel prevented the tribe from seeking declaratory judgment as to its jurisdiction under § 1911(a)).

> *Rooker-Feldman* doctrine does not apply to the action at bar.

285 F.Supp.2d at 1233-34. We reach the same conclusion, but via a different path.

On its face, the statutory language is clear and very broad: "*any* court of competent jurisdiction" may invalidate a state court action. 25 U.S.C. § 1914 (emphasis added). Certainly the federal court easily fits within the broad "any court" language, but we must determine whether the statute confers jurisdiction upon the federal courts.

At the outset, it is important to note that despite broad language, § 1914 is not a statute that itself confers jurisdiction. In an analogous situation involving the Administrative Procedure Act, the Supreme Court reasoned that 5 U.S.C. § 703's reference to a "court of competent jurisdiction" was not a grant of subject-matter jurisdiction:

> Title 5 U.S.C. § 702 makes clear that a person wronged by agency action "is entitled to judicial review thereof." But § 703 suggests that this language was not intended as an independent jurisdictional foundation, since such judicial review is to proceed "in a court specified by statute" or "in a court of competent jurisdiction." Both of these clauses seem to look to outside sources of jurisdictional authority. Thus, at best, the text of [§§ 702 and 703] is ambiguous in providing a separate grant of subject-matter jurisdiction.

Califano v. Sanders, 430 U.S. 99, 106 n. 6, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977).[9]

Applying *Califano*, we conclude that § 1914's reference to "any court of competent jurisdiction" alone does not create subject-matter jurisdiction in the federal district court sufficient to review and vacate state custody decrees. Consequently, we must determine whether the federal district court had jurisdiction from an independent source, 28 U.S.C. § 1331, making it a "court of competent jurisdiction" that is authorized by § 1914 to invalidate certain state court child custody proceedings.

More than a decade ago, we resolved that ICWA creates an implied cause of action and thus serves as a basis for federal question jurisdiction under 28 U.S.C. § 1331. In *Native Village of Venetie v. Alaska*, 944 F.2d 548 (9th Cir.1991) ("*Native Village of Venetie I*"), we concluded that Congress intended to create a federal private right of action in tribes and individuals to seek a determination of their ICWA rights and obligations in federal district court under ICWA's full faith and credit clause in § 1911(d):

> [W]e see no reason that Congress would not have intended to give Indian tribes access to federal courts to determine their rights and obligations

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9. *See also Indus. Indem., Inc. v. Landrieu*, 615 F.2d 644, 646-47 (5th Cir.1980) (provision in National Housing Act that the "Secretary shall . . . be authorized . . . to sue and be sued in any court of competent jurisdiction" was a waiver of sovereign immunity only, and the district court's subject matter jurisdiction came from 28 U.S.C. § 1331).

> under the Indian Child Welfare Act. The Act includes an express congressional finding that state courts and agencies have often acted contrary to the interests of Indian tribes.
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> It would thus be ironic indeed if Congress then permitted only state courts, never believed by Congress to be the historical defenders of tribal interests, to determine the scope of tribal authority under the Act.
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> Without a cause of action under the Indian Child Welfare Act, [the individual tribal members] would be essentially left without a remedy. We cannot conceive that Congress intended such a self-defeating result.

Id. at 553-54.

We reaffirmed our holding when the case returned to the Ninth Circuit:

> In considering our jurisdiction in [*Native Village of Venetie I*], we held that § 1911(d) of the ICWA gave both the Native villages and their individual residents private rights of action in federal court. We reasoned that, given Congress's understanding at the time of passage that statutes passed for the

> benefit of Indian tribes would "be liberally construed in favor of such tribes," Congress would have expressly precluded a federal cause of action had it intended that none be recognized. After finding "no reason that Congress would not have intended to give Indian tribes access to federal courts to determine their rights and obligations under the Indian Child Welfare Act," the court held that "Congress's intention to create a tribal cause of action under the Act can be inferred."

Native Village of Venetie v. Alaska, 155 F.3d 1150, 1152 (9th Cir.1998) (internal citations omitted) ("Native Village of Venetie II").[10]

The Indian canons of construction were critical to our reasoning:

> Congress's intention to create a tribal cause of action under the [ICWA] can be inferred from Congress's understanding of the law at the time the Act was enacted. The intention of Congress can be gleaned, at least in part, by reference to prior law, as Congress is presumed to be knowledgeable about existing law pertinent to any

10. It bears noting that the *Native Village of Venetie* cases did not involve an effort to invalidate a state court judgment, but rather, involved an effort to force state executive agencies to recognize tribal adoption decrees. This posture, however, does not alter our reliance on the holding in the *Native Village of Venetie* cases that ICWA creates a federal private right of action over which district courts have federal-question jurisdiction.

> new legislation. Thus, Congress can be presumed to know that statutes passed for the benefit of Indian tribes will be liberally construed in favor of such tribes. Congress can also be presumed to know that the federal courts routinely resolve questions of tribal sovereignty as they are implicated by various acts of Congress. If Congress did not seek to have such principles applied to the interpretation of the Indian Child Welfare Act, we presume that it would have said so. Thus, we must conclude that the villages may seek determination of their rights under the Act in federal court.
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> As to [the individual tribal members'] individual causes of action under the Indian Child Welfare Act, the same reasoning applies.

Native Village of Venetie I, 944 F.2d at 554 (internal citations omitted). The rationale in *Native Village of Venetie I* that § 1911(d) included an implied federal private right of action equally supports recognizing an implied federal private right of action in § 1911(a) for tribes and individuals to seek federal district court determination of the tribe's jurisdiction over child custody proceedings involving Indian children domiciled on the reservation.

Having resolved that the federal district court is a "court of competent jurisdiction" under § 1914, we turn to the remainder of the statute. Section 1914 provides that the Indian child, the parent or Indian custodian, or the tribe "may petition any court of competent jurisdiction to invalidate such

action." 25 U.S.C. § 1914. The action referred to is a state court action for "foster care placement or termination of parental rights." *Id.* The language of the statute could not be clearer: Congress is authorizing any court of competent jurisdiction to invalidate a state court judgment involving the Indian child.[11] Having concluded that Congress created a federal cause of action over which the federal courts have subject matter jurisdiction under 28 U.S.C. § 1331, it requires no leap for us to conclude further that Congress explicitly authorized federal courts to invalidate state court judgments in this limited arena.

We recognize that the prudential concerns embodied by the *Rooker-Feldman* doctrine are important to our system of limited federal court jurisdiction and federalism. The *Rooker-Feldman* doctrine, however, will give way where Congress otherwise grants federal courts the authority to review state court judgments. Although Congress did not specifically identify *federal* courts in ICWA as the tribunals designated to review state judgments, in contrast to the habeas and bankruptcy statutes, here Congress went one step further and gave "any court of competent jurisdiction" the authority to "invalidate" certain state child custody proceedings.

To the extent there is any uncertainty about the scope of federal authority to invalidate state court child custody

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11. Although not necessary to our analysis, we note that the legislative history is equally clear: "Section 104 [25 U.S.C. § 1914] authorizes the child, parent, or Indian custodian or the tribe to move to set aside any foster care placement or termination of parental rights on the grounds that the rights secured under [25 U.S.C. §§ 1911, 1912, or 1913] were violated." H.R.Rep. No. 95-1386, at 23 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7546.

proceedings, a proposition we do not embrace, one of the Indian canons of construction resolves the issue. It provides that federal courts will liberally construe a federal statute in favor of Indians, with ambiguous provisions interpreted for their benefit. *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985). The purpose of ICWA was to rectify state agency and court actions that resulted in the removal of Indian children from their Indian communities and heritage.[12] Resolving any ambiguity in favor of the Indians yields a conclusion that Indians have a forum in federal court to challenge state child custody decisions. We thus conclude that § 1914 provides the federal courts authority to invalidate a state court foster care placement or termination of parental rights if it is in violation of §§ 1911, 1912, or 1913.

III. The Indian Child Welfare Act And Public Law 280 Jurisdiction

A. Summary

Resolution of Mary Doe's case requires us to decide whether her tribe has exclusive jurisdiction in a child dependency proceeding. We begin with § 1911(a), which provides:

> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding

12. *See* 25 U.S.C. § 1901(5) ("Congress finds . . . that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.").

> involving an Indian child who resides or is domiciled within the reservation of such tribe, *except where such jurisdiction is otherwise vested in the State by existing Federal law.*

25 U.S.C. § 1911(a) (emphasis added). The "existing Federal law" proviso in § 1911(a) has been interpreted to include a federal law popularly referred to as "Public Law 280," which gives certain states, including California, broad jurisdiction over criminal offenses committed in Indian country, 18 U.S.C. § 1162(a), and limited jurisdiction over civil causes of action that arise in Indian country, 28 U.S.C. § 1360(a). *See Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 42 n. 16, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989). No other "existing Federal law" is applicable here.

The first step is to determine whether the proceeding "involv[es] an Indian child who resides or is domiciled" on the reservation. 25 U.S.C. § 1911(a). Jane, who no one disputes is an Indian child, was domiciled on her reservation when the child dependency proceedings in this case commenced.

The next step is to determine whether the dependency proceeding at issue falls within the meaning of "any child custody proceeding." *Id.* Again, the statutory language provides an easy answer as "child custody proceeding" is defined to include "termination of parental rights," which means "any action resulting in the termination of the parent-child relationship," and "adoptive placement," which means "the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption."

25 U.S.C. §§ 1903(1)(ii), (iv). These are precisely the actions taken in the proceedings at issue here.

On its face, § 1911(a) poses little difficulty in interpretation. The wrinkle comes in interpreting Public Law 280, which is embedded within § 1911. Section 1911(a) provides in unambiguous terms that the tribe has *exclusive* jurisdiction over any child custody proceeding involving an Indian child residing or domiciled on the reservation *unless* jurisdiction is vested in a state under Public Law 280. Thus, we must decide whether Public Law 280 vested California with jurisdiction to terminate Mary Doe's parental rights and order the adoption of Jane.

The answer to that question lies in the interplay between California's child dependency law and Public Law 280. The California child dependency law, Cal. Welf. & Inst.Code § 300 et seq., permits the state to commence dependency proceedings in juvenile court, § 325, if a child's status falls within various categories, including that the child suffered or is at substantial risk of physical harm, § 300(b), or the child has been or is at substantial risk of being sexually abused, § 300(d). The law permits the state, under certain circumstances, to petition for the termination of parental rights over a child previously judged to be a dependent of the juvenile court. Cal. Welf. & Inst.Code § 366.26.

Determining whether the state had jurisdiction under Public Law 280 to enforce its child dependency law requires us to categorize the state dependency law as either criminal, civil regulatory, or civil adjudicatory. If the child dependency law embodies either a criminal offense under 18 U.S.C.

§ 1162(a) or a civil cause of action (civil adjudicatory) under 28 U.S.C. § 1360(a), then the tribe does not have exclusive jurisdiction under § 1911(a) and the state properly exercised jurisdiction. If, however, California's dependency law is a regulatory statute, then the tribe had exclusive jurisdiction and the parental rights determination is invalid. *See Bryan v. Itasca County,* 426 U.S. 373, 390, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976) (Public Law 280 did not give the states "general civil regulatory powers" over tribes and their members in Indian country).

Mary Doe argues that California's dependency law falls into the civil regulatory category and thus outside the state's Public Law 280 jurisdiction. *See Bryan,* 426 U.S. at 390, 96 S.Ct. 2102. She asks us to reach this conclusion by drawing a distinction between involuntary and voluntary custody proceedings. She maintains that involuntary child dependency proceedings are regulatory because they involve intervention by the state, through its sovereign authority, in a parent-child relationship. This type of proceeding, according to Mary Doe, contrasts with voluntary proceedings such as private adoptions, which involve only private parties and are not regulatory.

The Department of Social Services and Court-Appellees also stake their analysis on an interpretation of Public Law 280. In their view, the dependency statute falls under either the criminal or the civil adjudicatory category, meaning that the tribe lacks exclusive jurisdiction. They argue that the voluntary/involuntary dichotomy is a false one and should not inform our analysis.

Although California's child dependency statute may not fit neatly into any of the Public Law 280 jurisdictional boxes, construing ICWA as a whole and considering child dependency proceedings in the context of both ICWA and Public Law 280, we conclude that the California statute does not fall within Public Law 280's criminal jurisdiction, but that it does fall within Public Law 280's civil adjudicatory jurisdiction. Embedded in this determination is the conclusion that the child dependency statute is not regulatory in nature. Thus, under ICWA, the tribe does not have exclusive jurisdiction over the child dependency proceeding because "jurisdiction is otherwise vested in the state [of California] by existing Federal law." 25 U.S.C. § 1911(a). Before delving into the application of Public Law 280, we take a detour to explain the contours of ICWA and Public Law 280, which provide the foundation for our analysis.

B. Background Of ICWA

Congress passed ICWA in 1978 in response to a growing concern that Indian children were removed from their homes by state child protection officials at an alarmingly high rate and placed in foster care or adoption settings outside their Indian communities and culture. *See* 25 U.S.C. § 1901(4); *Holyfield,* 490 U.S. at 32, 109 S.Ct. 1597. "At the heart of ICWA" lies a jurisdictional scheme aimed at ensuring that tribes have a role in adjudicating and participating in child custody proceedings involving Indian children domiciled both on and off the reservation. *Holyfield,* 490 U.S. at 36, 109 S.Ct. 1597. This aim is reflected in § 1911(a)'s broad grant of exclusive jurisdiction to most tribes. 25 U.S.C. § 1911(a).

As we have explained, the "existing Federal law" proviso in § 1911(a), providing tribes with exclusive jurisdiction "except where such jurisdiction is otherwise vested in the State by existing Federal law," is the crux of this case. Although the text of the proviso does not specifically identify Public Law 280, the legislative history surrounding the adoption of § 1911(a) and subsequent court decisions confirm that Congress was referring, at least in part, to Public Law 280. *See* H.R.Rep. No. 95-1386, at 32 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7554 (letter from Department of Interior); H.R.Rep. No. 95-1386, at 40, 1978 U.S.C.C.A.N. 7530, 7563 (letter from Department of Justice); *Holyfield,* 490 U.S. at 42 n. 16, 109 S.Ct. 1597; *Native Village of Venetie I,* 944 F.2d at 555.

An earlier draft of ICWA, House Resolution 12533, included a provision similar to § 1911(a) but did not refer to "existing" federal laws: "Sec. 101.(a) An Indian tribe shall have jurisdiction exclusive as to any State over any placement of an Indian child who resides on or is domiciled within the reservation of such tribe." Court-Appellees' Answer Brief at App. 22. During consideration of this earlier legislation, the Departments of Justice and Interior alerted Congress that this section could strip states of jurisdiction already existing where Public Law 280 applied. The Department of the Interior stated, "We believe that reservations located in States subject to Public Law 83-280 should be specifically excluded from section 101(a). . . ."[13] The Department of Justice voiced similar concerns in two letters to Congress:

13. Letter from Forrest J. Gerard, Assistant Secretary of Interior, H.R.Rep. No. 95-1386, at 32, *reprinted in* 1978 U.S.C.C.A.N. 7530, 7554.

> As you may be aware, the courts have consistently recognized that tribal governments have exclusive jurisdiction over the domestic relationships of tribal members located on reservations, unless a State has assumed concurrent jurisdiction pursuant to Federal legislation such as Public Law 83-280. . . . [S]ection 101(a) of the House draft, if read literally, would appear to displace any existing State court jurisdiction over these matters based on Public Law 83-280. We doubt that is the intent of the draft because, inter alia, there may not be in existence tribal courts to assume such State-court jurisdiction as would apparently be obliterated by this provision.[14]

After these letters were received, Congress amended the legislation to include the "existing Federal law" proviso that became law.

C. Public Law 280

Twenty-five years prior to the passage of ICWA, Congress adopted Public Law 280, legislation that provides six "mandatory" states, including California,[15] with

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14. Letters of Patricia M. Wald, Assistant Attorney General, H.R.Rep. No. 95-1386, at 35, 40, *reprinted in* 1978 U.S.C.C.A.N. 7530, 7558, 7563.

15. The five other mandatory states are Alaska, Minnesota, Nebraska, Oregon, and Wisconsin. 18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a). Alaska was added by amendment in 1958. *See Native*

(Cont'd)

jurisdiction over criminal and some civil matters arising in Indian country.[16] The criminal jurisdiction conferred by Public Law 280 is expansive:

> Each of the States or Territories listed . . . shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed . . . to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory. . . .

(Cont'd)

Village of Venetie I, 944 F.2d at 560. In a few of these states, specific reservations are exempted from the state's Public Law 280 jurisdiction, but all Indian country in California is subject to the state's criminal and civil Public Law 280 jurisdiction. *See* 18 U.S.C. § 1162(a), 28 U.S.C. § 1360(a).

16. Until amended in 1968, Public Law 280 permitted states that were not designated as mandatory Public Law 280 states by the statute to assert similar jurisdiction over Indian country within state borders. *See Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 471 n. 9, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979) (quoting original text of Public Law 280). Thus, for example, Washington, Idaho, Florida, and Iowa also asserted various degrees of Public Law 280 jurisdiction. These states are sometimes referred to as "non-mandatory" Public Law 280 states. After 1968, no additional states could assert jurisdiction under Public Law 280 without tribal consent.

18 U.S.C. § 1162(a). The civil jurisdiction conferred by Public Law 280, on the other hand, is more circumscribed:

> Each of the States listed . . . shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State. . . .

28 U.S.C. § 1360(a).

The legislative history of Public Law 280 reveals that Congress was motivated to confer criminal jurisdiction on the states due to "lawlessness" on Indian reservations:

> In many States, tribes are not adequately organized to perform that function; consequently, there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.

S.Rep. No. 699 (1953), *reprinted in* 1953 U.S.C.C.A.N. 2409, 2411-12.

In contrast, the civil component of Public Law 280 was adopted with a "virtual absence of expression of

congressional policy or intent." *Bryan,* 426 U.S. at 381, 96 S.Ct. 2102. What little published legislative history exists provides only the following explanation for the civil jurisdiction:

> Similarly, the Indians of several States have reached a state of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian country within their borders. Permitting the State courts to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general application to private persons or private property, is deemed desirable.

S.Rep. No. 699 (1953), *reprinted in* 1953 U.S.C.C.A.N. 2409, 2412. In *Bryan,* one of the seminal cases construing Public Law 280, the Court concluded that Congress intended to confer civil jurisdiction in Public Law 280 states to "redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes...." 426 U.S. at 383, 96 S.Ct. 2102. However, the Court emphasized that the legislative history included no indication of "an intention to confer general state civil regulatory control over Indian reservations." *Id.* at 384, 96 S.Ct. 2102.

Appendix A

D. PUBLIC LAW 280 AND ICWA PRECEDENT

The federal courts have interpreted ICWA on rare occasions, and while some courts have danced seductively close to the issue, none has ever directly addressed either Public Law 280 jurisdiction over child custody proceedings or whether there is a difference between voluntary and involuntary child custody proceedings in the context of Public Law 280. More specifically, no court has addressed the California child dependency statute.

The Supreme Court's only case interpreting ICWA, *Holyfield,* included a footnote that referenced the "existing Federal law" proviso in § 1911(a):

> Section 1911(a) does not apply "where such jurisdiction is otherwise vested in the State by existing Federal law." This proviso would appear to refer to Pub.L. 280, 67 Stat. 588, as amended, which allows States under certain conditions to assume civil and criminal jurisdiction on the reservations. Title 25 U.S.C. § 1918 permits a tribe in that situation to reassume jurisdiction over child custody proceedings upon petition to the Secretary of the Interior. The State of Mississippi has never asserted jurisdiction over the Choctaw Reservation under Public Law 280.

490 U.S. at 42 n. 16, 109 S.Ct. 1597. This passing reference does not resolve whether California's child dependency proceedings fall within the state's Public Law 280 criminal or civil jurisdiction. Not only is Mississippi not a Public Law

280 state, but the child custody proceeding at issue in *Holyfield* was a voluntary adoption initiated by the Indian parents of Indian twins. *Id.* at 37-38, 109 S.Ct. 1597. *Holyfield* did not involve, as this case does, an involuntary termination of an Indian's parental rights.

Similar to the *Holyfield* footnote, the Ninth Circuit has made a broad, but ultimately non-dispositive, statement about the interplay between § 1911(a) and Public Law 280. *See Native Village of Venetie I,* 944 F.2d at 555 (noting that tribes in Public Law 280 states can invoke exclusive jurisdiction under § 1911 only after petitioning the Secretary of Interior). Like *Holyfield, Native Village of Venetie I* involved a voluntary, private adoption and the court limited its discussion of the expanse of Public Law 280's civil jurisdiction to private adoption cases. *Id.* at 560 ("It is not disputed that *private adoption cases* are included within this transfer of civil jurisdiction [in Public Law 280] from the federal government to the states.") (emphasis added).

States that have considered the interplay between Public Law 280 and a state's authority to enforce child dependency laws in Indian country have arrived at conflicting results. On one side, the Wisconsin Attorney General concluded that involuntary child custody proceedings lie outside Wisconsin's Public Law 280 jurisdiction because they "involve some aspect of the state's regulatory jurisdiction." 70 Op. Att'y Gen. Wis. 237 (1981), 1981 Wisc. AG LEXIS 7, *7, 18-20. The Attorney General contrasted voluntary proceedings, which are "not between the state and an individual, but rather primarily involve[ ] only private persons." *Id.* at *7. No other source has adopted this voluntary versus involuntary custody

analysis.[17] In contrast, Washington and Idaho, two non-mandatory Public Law 280 states, have long identified child dependency proceedings as a subject matter within their Public Law 280 jurisdiction. *See Washington v. Confederated Bands and Tribes of the Yakima Indian Nation,* 439 U.S. 463, 465 n. 1, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979) (quoting Washington's 1963 law asserting Public Law 280 jurisdiction);[18] *State v. George,* 127 Idaho 693, 905 P.2d 626, 629 (1995) (quoting Idaho's 1963 law asserting Public Law 280 jurisdiction).[19],[20]

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17. The Ninth Circuit cited the Wisconsin Attorney General's opinion favorably in *Native Village of Venetie I,* although for the separate proposition that Public Law 280 jurisdiction only provides states with "concurrent" jurisdiction over private adoption cases, not "exclusive" jurisdiction. *Native Village of Venetie I,* 944 F.2d at 561.

18. Washington's Public Law 280 jurisdiction remains codified today at Wash. Rev.Code § 37.12.010 (2005) and includes "[d]omestic relations," "[a]doption proceedings," and "dependent children." *Id.* at §§ (3), (6) and (7).

19. Idaho's Public Law 280 jurisdiction remains codified today at Idaho Code § 67-5101 (2004) and includes "Dependent, neglected and abused children." *Id.* at § C.

20. Both states asserted jurisdiction over child dependency proceedings in Indian country long before the Supreme Court issued its landmark Public Law 280 decisions in *Bryan* (1976) and *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), and before Congress enacted ICWA in 1978.

In sum, we navigate the question whether California properly exercised jurisdiction over Jane's dependency proceedings without much of a compass.

IV. ICWA, Public Law 280, And The California Dependency Regime

Given that no federal court has squarely addressed the question, we must break new ground in deciding whether California's child dependency proceedings are within California's Public Law 280 jurisdiction. Our analysis proceeds in two steps. First, is California's child dependency law criminal in nature? Second, if the child dependency law cannot be considered criminal, does enforcement of this law fall within the state's Public Law 280 civil adjudicatory jurisdiction, or is the state enforcing a "regulatory" law that is outside the state's jurisdiction under *Bryan?* Resolution of these questions must also be squared with an overall statutory analysis of ICWA, as Public Law 280 does not stand alone here but is integrated into the ICWA scheme.

A. Public Law 280 Criminal Jurisdiction

1. Identifying Criminal/Prohibitory Laws Under Public Law 280

In *California v. Cabazon Band of Mission Indians,* the Supreme Court succinctly outlined the path to deconstructing Public Law 280:

> In *Bryan v. Itasca County,* we interpreted [28 U.S.C. § 1360(a)] to grant States jurisdiction

> over private civil litigation involving reservation Indians in state court, but not to grant general civil regulatory authority. . . . [Public Law 280] plainly was not intended to effect total assimilation of Indian tribes into mainstream American society. We recognized that a grant to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values. Accordingly, when a State seeks to enforce a law within an Indian reservation under the authority of Pub.L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under [18 U.S.C. § 1162(a)], or civil in nature, and applicable only as it may be relevant to private civil litigation in state court.

480 U.S. 202, 208, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987) (internal citations omitted). The decision establishes three categories into which a state law may fall: criminal, regulatory, and civil law relevant to private litigation. *Id.*

In *Cabazon,* the Court applied this analytical framework by grappling with whether the State of California could enforce its penal code in Indian country for violation of the state's bingo laws. *Id.* at 205, 107 S.Ct. 1083. The Court observed that state regulatory laws are often enforced with penal sanctions, making them appear "criminal" for Public Law 280 purposes, and thereby avoiding the regulatory classification that would prevent their enforcement under *Bryan. Id.* at 211, 107 S.Ct. 1083 ("But that an otherwise regulatory law is enforceable by criminal as well as civil

means does not necessarily convert it into a criminal law within the meaning of Pub.L. 280. Otherwise, the distinction between [Public Law 280's criminal jurisdiction and civil jurisdiction] could easily be avoided...."). Under *Cabazon*, the label attached to the law in the state's statutory code is not the determinative factor for the purposes of classifying a law as either criminal or regulatory in nature. *Id.* Rather, the critical factor is whether the conduct at issue in the statute is generally prohibited by the state, or whether the conduct is generally permitted by the state but subject to regulation:

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub.L. 280 does not authorize its enforcement on an Indian reservation.

Id. at 209, 107 S.Ct. 1083.

The Court ultimately determined that the bingo laws were regulatory in nature, even though enforced with penal sanctions, because "California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery," demonstrating that "California regulates rather than prohibits gambling in general and bingo in particular." *Id.* at 211, 107 S.Ct. 1083. Federal and state courts have applied the *Cabazon* criminal/prohibitory versus regulatory test with widely varying results,

provoking some commentators to question whether the test is manageable in its current form.[21] The variation tends to result from how courts characterize the scope of the conduct at issue.[22]

Some courts take a broad perspective by considering the conduct in the context of a larger permitted but regulated activity,[23] while other courts have focused

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21. *See generally* Arthur F. Foerster, *Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction*, 46 UCLA L.Rev. 1333 (1999); Emma Garrison, *Baffling Distinctions Between Criminal and Regulatory: How Public Law 280 Allows Vague Notions of State Policy to Trump Tribal Sovereignty*, 8 J. Gender Race & Just. 449 (2004).

22. *See State v. Stone*, 572 N.W.2d 725, 729 (Minn.1997) ("[T]here has been a split of authority among courts across the country, including the Minnesota court of appeals, regarding the application of the *Cabazon* test. Those courts which have interpreted 'conduct' to refer to the broad activity have focused on this aspect without regard to the particularities of the narrow conduct. Those courts which have interpreted 'conduct' to refer to the narrow activity have focused primarily on whether the narrow conduct is categorically prohibited or whether the statute controlling the conduct contains exceptions.").

23. *See Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 539 (9th Cir.1995) (considering conduct of gambling, not whether electronic machine gambling was prohibited in California, and concluding "the state cannot regulate and prohibit, alternately, game by game and device by device, turning its public policy off and on by minute degrees. *Cabazon Band* addressed the problem at a higher level of generality than that"); *Quechan Indian Tribe v.*

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on the narrow conduct specifically at issue in the case.[24]

Our decision in *Confederated Tribes of the Colville Reservation v. Washington*, 938 F.2d 146 (9th Cir.1991), provides a concrete example of the difficulty of classifying a state law based on the specific conduct that is prohibited. In *Confederated Tribes of Colville*, we considered whether Washington state's traffic offense statutes, including its speeding laws, were prohibitory or regulatory in nature. *Id.* at 147. We concluded, relying on the broad line drawing

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McMullen, 984 F.2d 304, 307 (9th Cir.1993) (concluding state fireworks laws were criminal/prohibitory because although fireworks could be sold eight days out of the year in California, the conduct was generally prohibited); *Twenty-Nine Palms Band of Mission Indians v. Wilson*, 925 F.Supp. 1470, 1477 (C.D.Cal.1996) (professional boxing is a regulated subset of the generally permitted activity of boxing) (*vacated*, 156 F.3d 1239 (9th Cir.1998)); *Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310 (5th Cir.1981) (bingo is among types of gambling permitted but regulated by Florida); *State v. Stone*, 572 N.W.2d at 730-31(laws prohibiting driving without proof of insurance, without a license, without a seatbelt, etc., are laws within larger context of permitted, but regulated, activity of driving).

24. *St. Germaine v. Circuit Court*, 938 F.2d 75, 77 (7th Cir.1991) (driving with a revoked license is prohibited by state law, and not simply considered part of regulated conduct of driving); *State v. Busse*, 644 N.W.2d 79, 84-85 (Minn.2002) (driving after license wascancelled after four DUI convictions was prohibited by state law, and not simply considered part of regulated conduct of driving); *State v. Robinson*, 572 N.W.2d 720, 724 (Minn.1997) (underage drinking is prohibited by state law, and not simply considered part of regulated conduct of alcohol consumption).

in *Cabazon*, that *driving* was the conduct at issue, not *speeding*—even though speeding was certainly a prohibited activity in Washington state. *Id.* at 148. Thus, because driving is a generally permitted but regulated activity, the state law was regulatory in nature and could not be enforced by state officers against Indians in Indian country:

> Laws which prohibit absolutely certain acts fall into the [criminal/prohibitory] category, while those generally permitting certain conduct but subject to regulation are within [the regulatory category]. . . . *Cabazon* focuses on whether the prohibited activity is a small subset or facet of a larger, permitted activity—high-stakes unregulated bingo compared to all bingo games—or whether all but a small subset of a basic activity is prohibited.

Id. at 147, 149.

The Supreme Court injected another wrinkle in the analysis when it held that the "shorthand test" for whether a law is prohibitory or regulatory is "whether the conduct at issue violates the State's public policy." *Cabazon*, 480 U.S. at 209, 107 S.Ct. 1083. If the conduct at issue violates public policy, then the law is more likely criminal/prohibitory. *Id.* Significantly, the Ninth Circuit has held that permitting tribes rather than states to enforce a policy does not undermine state public policy. For instance, in *Confederated Tribes of Colville*, we acknowledged that tribal enforcement of its own

traffic code in lieu of the state's speeding laws would not undermine the state's public policy:

> Thus, although the government is correct that *speeding* remains against the state's public policy, *Cabazon* teaches that this is the wrong inquiry. *Cabazon* focuses on whether the prohibited activity is a small subset or facet of a larger, permitted activity—high-stakes unregulated bingo compared to all bingo games—or whether all but a small subset of a basic activity is prohibited. Thus, in *United States v. Marcyes*, 557 F.2d 1361, 1364 (9th Cir.1977) we found . . . [t]o allow tribal members to operate fireworks stands on reservations would "entirely circumvent Washington's determination that the possession of fireworks is dangerous." *Marcyes*, 557 F.2d at 1364. *But to look to the Tribes rather than the state for traffic enforcement on the reservation will not detract from Washington's determination to discourage speeding.*

Confederated Tribes of Colville, 938 F.2d at 148-49 (emphasis added).

2. Analysis of the California Child Dependency Statute as a Criminal Statute

Although the Ninth Circuit and numerous other courts have applied the *Cabazon* test to state gaming, driving, fireworks, and boxing laws, to name just a few, reconciling the many distinctions and finding a common, consistent

thread of analysis is neither an easy task nor a productive one. In particular, applying the criminal versus regulatory test to Mary Doe's case is unwieldy because it is problematic to compare a state's child dependency statutory scheme to a criminal prosecution or to state gaming laws. Overall, California's child dependency law and proceedings are aimed at promoting the best interests of the child, not at prohibiting conduct. As a result, the dependency proceedings do not fall within California's broad Public Law 280 criminal jurisdiction over Indians.

First and foremost, the statute does not prohibit specific conduct. Rather, the child dependency statute gives the state broad authority to remove children and terminate parental rights under specific circumstances. Granted, the state's authority under the statute is often triggered if a child is a victim or at substantial risk of harm, abuse, or neglect. Cal. Welf. & Inst.Code §§ 300(a), (b), (d), (e), (f), (j). Indeed, Jane was made a dependent of the juvenile court pursuant to §§ 300(b) and (d) because her mother had failed to adequately supervise and protect her from physical harm and because Jane was the alleged victim of sexual abuse from which her mother failed to protect her.

But the statute is also triggered where abuse is not an issue, such as where the child is suffering from mental illness and the parents cannot address this special need. Cal. Welf. & Inst.Code § 300(c). Likewise, subsection (h) makes a child a dependent of the juvenile court if "[t]he child has been freed for adoption by one or both parents for 12 months by either relinquishment or termination of parental rights or an adoption petition has not been granted." Cal. Welf. &

Inst.Code 8450 § 300(h). Both of these provisions demonstrate that abusive conduct or neglect is not necessarily a predicate to trigger California's child dependency statute.

While some of the circumstances that trigger the statute, such as child abuse, may constitute criminal violations under different parts of the California code, the statute itself does not require proof of a criminal violation nor does it prohibit such conduct.[25] Moreover, the statute provides that it is not designed to infringe on the permitted activity of parenting, suggesting that the state law regulates but a small facet of the generally permitted activity of parenting.[26]

It is also important to underscore that the statute is geared toward protecting the best interests of the child rather than controlling behavior. For that reason, our precedent that looks to categorization of the conduct at issue does not easily fit

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25. Unlike the Wisconsin civil statute at issue in *In re Burgess* that was found to be criminal for Public Law 280 purposes and permitted involuntary civil commitment of sexually violent people only if they had been convicted of a criminal offense, 262 Wis.2d 354, 665 N.W.2d 124, 132 (2003), child dependency proceedings in California may be triggered regardless of whether the state pursues any criminal prosecution of a parent or a guardian for abuse or neglect.

26. "It is the intent of the Legislature that nothing in this section disrupt the family unnecessarily or intrude inappropriately into family life, prohibit the use of reasonable methods of parental discipline, or prescribe a particular method of parenting. Further, nothing in this section is intended to limit the offering of voluntary services to those families in need of assistance but who do not come within the description of this section." Cal. Welf. & Inst.Code § 300.

this statute. Of course, one could say that the statute regulates parenting, which is a permitted activity. Or one could argue that the statute prohibits abuse. But this framework is not particularly transferable because the well-being of the child, not conduct of the parent, is the focus of the statute and no specific conduct is prohibited.

Although the criminal versus civil inquiry is "one of the statute's intent and not simply its label," *Quechan Indian Tribe,* 984 F.2d at 307, the fact that California's child dependency statute is codified in the civil code is telling. More importantly, the California Supreme Court has affirmed that child dependency proceedings are civil in nature. *See In re Malinda S.,* 51 Cal.3d 368, 384, 272 Cal.Rptr. 787, 795 P.2d 1244 (Cal.1990) (quoting *In re Mary S.,* 186 Cal.App.3d 414, 418, 230 Cal.Rptr. 726 (Cal.Ct.App.1986)).[27]

Just as significant, the proceedings are not punitive. "Dependency proceedings are civil in nature, designed not to prosecute the parent, but to protect the child." *In re Mary S.,* 186 Cal.App.3d at 418, 230 Cal.Rptr. 726; *see also In re Malinda S.,* 51 Cal.3d at 384, 272 Cal.Rptr. 787, 795 P.2d

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27. "For many years, the courts characterized the nature of the dependency system inconsistently. Some viewed it as civil in nature. . . . Others viewed it as quasi-criminal in nature. . . . In 1990, however, the California Supreme Court described dependency proceedings as civil in nature, designed not to punish the parent but to protect the child. . . . While they may be civil in nature, these proceedings are significantly different from ordinary civil actions by reason of the way they affect the fundamental rights of parents and children." Gary C. Seiser & Kurt Kumli, *California Juvenile Courts Practice and Procedure* § 2.10[2] (2004).

1244 (same); *Collins v. Superior Court,* 74 Cal.App.3d 47, 52, 141 Cal.Rptr. 273 (Cal.Ct.App.1977) ("The purpose of these dependency proceedings is to protect and promote the welfare of the child, not to punish the parent.").

Consistent with the notion that the proceedings are neither criminal nor punitive, the procedural protections available in California's child dependency proceedings lie somewhere between criminal and civil in nature. *See Confederated Tribes of Colville,* 938 F.2d at 148 (considering procedural elements in assessing whether the state scheme was criminal or civil). Although indigent parents have a statutory right to counsel similar to that afforded criminal defendants, Cal. Welf. & Inst.Code § 317, the standard of proof required to remove a child from the parents' custody is "clear and convincing evidence," § 361(c),[28] something more akin to the civil standard of preponderance of the evidence than to the criminal standard of beyond a reasonable doubt. Many other procedural protections associated with criminal proceedings are likewise unavailable:

> A parent at a dependency hearing cannot assert the Fourth Amendment exclusionary rule, since 'the potential harm to children in allowing them to remain in an unhealthy environment outweighs any deterrent effect which would result from

28. In ICWA cases, state courts can terminate parental rights only when the determination is proven beyond a reasonable doubt. 25 U.S.C. § 1912(f). This provision does not alter our analysis of whether California's child dependency statute is criminal for Public Law 280 purposes.

> suppressing evidence' unlawfully seized. Nor can the parent seek reversal on the grounds of incompetency of counsel.

In re Malinda S., 51 Cal.3d at 384-85, 272 Cal.Rptr. 787, 795 P.2d 1244 (quoting *In re Mary S.*, 186 Cal.App.3d at 418-19, 230 Cal.Rptr. 726); *see also Lois R. v. Superior Court*, 19 Cal.App.3d 895, 900, 97 Cal.Rptr. 158 (Cal.Ct.App.1971) ("[D]ependency proceedings are civil and have been conducted without strict adherence to all the formalities of a criminal trial.").

Finally, we address *Cabazon's* "shorthand test" for whether a law is prohibitory or regulatory, that is "whether the conduct at issue violates the State's public policy." 480 U.S. at 209, 107 S.Ct. 1083. California's public policy "to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm," Cal. Welf. & Inst.Code § 300.2, is not undermined simply because the law is not classified as criminal in nature. As in *Confederated Tribes of Colville*, "look[ing] to the Tribes rather than the state" for protection of children against abuse and neglect does not violate the state's public policy. *See* 938 F.2d at 149. Taken as a whole and considering the multiple factors used for analyzing whether a law is criminal/prohibitory, we conclude that the California child dependency statute is not prohibitory. Therefore, California may not enforce its involuntary child dependency statute in Indian country through its criminal Public Law 280 jurisdiction.

B. Public Law 280 Civil Jurisdiction

We next consider whether the child dependency law falls within Public Law 280's civil adjudicatory jurisdiction or whether it is analogous to a regulatory statute. *Bryan*, 426 U.S. at 390, 96 S.Ct. 2102. This distinction may be easy to state but, as noted in the *American Indian Law Deskbook*, the application is quite onerous.[29]

California may assert its Public Law 280 civil jurisdiction over cases that are "civil causes of action between Indians or to which Indians are parties" and that involve "those civil laws . . . that are of general application to private persons or private property." 28 U.S.C. § 1360(a). The plain language of Public Law 280's civil jurisdictional provision suggests that California's enforcement of its child dependency law falls within the state's Public Law 280 civil jurisdiction. The state proceedings involved a civil cause of action to which Mary Doe and her child, both Indians, were parties. In addition, California's child dependency law is of "general application to private persons" in the state of California.

While it is tempting to rest on this plain reading of the statute, the Supreme Court's language in *Bryan* and *Cabazon* gives us pause: those two cases intimate that Public Law 280's civil jurisdiction is limited to disputes between *private*

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29. "The distinction between state civil laws that may supply a rule of decision and state regulatory laws that cannot be enforced by virtue of Public Law 280 civil jurisdiction is hardly clear and has caused difficulty in application." *American Indian Law Deskbook* 219-20 (Hardy Myers & Clay Smith eds., 3d ed.2004).

parties, which begs the question whether when, as here, the state is one of the parties, a proceeding falls within Public Law 280's civil jurisdiction. In *Bryan,* the Supreme Court described the civil component of Public Law 280 as "primarily intended to redress the lack of adequate Indian forums for resolving *private legal disputes between reservation Indians, and between Indians and other private citizens. . . .*" *Bryan,* 426 U.S. at 383, 96 S.Ct. 2102 (emphasis added).

In *Cabazon,* the Court reiterated its holding that Public Law 280 granted to states civil jurisdiction only over private disputes. 480 U.S. at 208, 107 S.Ct. 1083. We later characterized a Public Law 280 state's "very limited" civil jurisdiction provision as "essentially [affording] Indians a forum to settle *private disputes among themselves.*" *Confederated Tribes of Colville,* 938 F.2d at 147 (emphasis added). Throughout these cases, the theme is that the private nature of disputes is what places them within Public Law 280's civil jurisdiction.

We are confident, however, that resting our analysis simply on the Supreme Court's references to private disputes would create a tortured result that is at odds with the overall structure of ICWA, as well as with the history of Public Law 280 and California child dependency proceedings.

To begin, the genesis of the Court's analysis in *Bryan* and *Cabazon* was very different from a child dependency proceeding. In both those cases, the broad language about "private legal disputes" and "private civil litigation" was made in the context of an attempt to categorize a state's

authority to regulate taxation and gambling. The taxation and gambling statutes both regulate the conduct of the public at large. They do not address the rights or status of private individuals. And, in the case of taxation, the Court was particularly sensitive to precedent barring states from taxing reservation Indians without express congressional approval.[30] In contrast, California's child dependency proceedings focus, not on public activities, but on the status of individual Indian parents and children.

At the heart of the dependency proceedings is a dispute about the status of the child, a private individual; the simple fact that the state steps in as a party does not transform what

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30. The Supreme Court in *Bryan* noted that prior decisions of the Court firmly established that without congressional authorization, the states were generally barred from imposing taxes on reservation Indians. 426 U.S. at 376-77, 96 S.Ct. 2102. The Court was particularly concerned with Congress's silence on any intention to confer taxing authority over Indian country through the civil component of Public Law 280:

> Of special significance for our purposes, however, is the total absence of mention or discussion regarding a congressional intent to confer upon the States an authority to tax Indians or Indian property on reservations. . . . This omission has significance in the application of the canon of construction applicable to statutes affecting Indian immunities, as some mention would normally be expected if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress.

Id. at 381, 96 S.Ct. 2102.

is an adjudicatory proceeding involving private parties into a regulatory proceeding.[31] In short, child dependency proceedings are more analogous to the "private legal disputes" that fall under a state's Public Law 280 jurisdiction than to the regulatory regimes at issue in *Bryan* and *Cabazon.*

A footnote in *Bryan* underscores that California's child dependency law is different from the taxation laws considered in that case and that it should not be considered "regulatory" in nature. In *Bryan,* the Supreme Court recognized commentary stating that laws having to do with status were the types of laws that Congress envisioned would fall within a state's civil Public Law 280 jurisdiction:

> A fair reading of these two clauses suggests that Congress never intended 'civil laws' to mean the entire array of state noncriminal laws, but rather that Congress intended 'civil laws' to mean those laws which have to do with private rights and

31. California and Minnesota treat suits brought by the state to collect child support from a parent as equivalent to private civil litigation under Public Law 280 jurisdiction. *See County of Inyo v. Jeff,* 227 Cal.App.3d 487, 494, 277 Cal.Rptr. 841 (Cal.Ct.App.1991) ("While Public Law 280 is structured in terms of private parties, we believe that the test is one of substance rather than form . . . [T]he mere fact that the state is a party does not in and of itself disqualify [the county]. The action of Inyo can be considered as private in substance."); *Becker County Welfare Dep't v. Bellcourt,* 453 N.W.2d 543, 544 (Minn.Ct.App.1990) (same). *But see State ex rel. Dep't of Human Services v. Whitebreast,* 409 N.W.2d 460, 463-64(Iowa 1987) (rejecting the state's contention that its petition filed "as next friend" transformed its public, regulatory duty into a private civil cause of action under Public Law 280).

> *status*. Therefore, 'civil laws . . . of general application to private persons or private property' would include the laws of contract, tort, marriage, divorce, *insanity,* descent, etc., but would not include laws declaring or implementing the states' sovereign powers, such as the power to tax, grant franchises, etc. These are not within the fair meaning of 'private' laws.

426 U.S. at 384 n. 10, 96 S.Ct. 2102 (emphasis added) (quoting Daniel H. Israel & Thomas L. Smithson, *Indian Taxation, Tribal Sovereignty and Economic Development,* 49 N.D. L.Rev. 267, 296 (1973)). While we do not view the Supreme Court's footnote as dispositive, we observe that the Court recognized "status" laws generally, and "insanity" laws particularly, as different from regulatory laws.

In a similar vein, the Wisconsin Supreme Court has categorized statutes involving status determinations as falling within Public Law 280's civil jurisdiction. That court held that a state civil statute permitting the state to involuntarily commit sexually violent persons applied to Indian country through either the state's Public Law 280 criminal jurisdiction or 8457 through the state's Public Law 280 civil jurisdiction. *In re Burgess,* 262 Wis.2d 354, 665 N.W.2d 124, 132 (2003). The Court referenced *Bryan's* "insanity" language to bolster its alternative civil analysis:

> In addition, even if [Wisconsin's involuntary civil commitment statute] is strictly construed as a "civil" law in its entirety, it is civil/adjudicatory rather than civil/regulatory, and therefore falls

> within PL-280's grant of civil jurisdiction to the State. . . .
>
> In this case, the adjudication of Burgess's mental health is a status determination, which is more similar to adjudications like those involving insanity, rather than regulations such as the power to tax.

Id. at 132-33. Even though the Wisconsin Attorney General's 1981 opinion concluded that the state would not enforce its involuntary child dependency law in Indian country because the law was "regulatory" in nature under *Bryan,* 70 Op. Att'y Gen. Wis. 237 (1981), 1981 Wisc. AG LEXIS 7, * 7, 18, 19-20, the state supreme court decision, which is controlling law in Wisconsin, recognized that a status determination is different than a regulatory regime for civil jurisdictional purposes under Public Law 280.

The distinction the Wisconsin Supreme Court drew between state adjudicatory jurisdiction and state regulatory jurisdiction is not without significant textual and historical support. As referenced in William Canby's *American Indian Law Nutshell:*

> The civil grant is one of power over "civil causes of action." This language would appear to mean that the state simply acquired adjudicatory jurisdiction— the power to decide cases—not the entire power to legislate and regulate in Indian country. . . .

Appendix A

> The Supreme Court [in *Bryan*] concluded that the primary purpose of the civil provisions of Public Law 280 was to provide a state forum for the resolution of disputes. Viewed in that light, the provision that the civil laws of the state should have effect in Indian country simply 'authorizes application by the state courts of their rules of decision to decide such disputes.'
>
> The effect of the Court's decision is to confine the civil grant of Public Law 280 to adjudicatory jurisdiction only.

William C. Canby, Jr., *American Indian Law in a Nutshell* 241-42 (4th ed.2004). That California's dependency law determines children's status is compelling evidence that it is adjudicatory, not regulatory.

Our conclusion does not rest solely on an abstract analysis of Public Law 280. One difficulty with applying *Bryan* and *Cabazon* in a vacuum is that, in those cases, the Court was forced to interpret Public Law 280 as a stand-alone statute without context and with virtually no legislative history. We face a different situation. Here, Public Law 280 is embedded within ICWA, a comprehensive statute with considerable legislative history and with a singular focus—child custody proceedings involving Indian children. Significantly, Public Law 280 must be interpreted as part and parcel of ICWA, the statute into which it is incorporated. Thus, we turn now to an analysis of the text, structure, history, and backdrop of ICWA.

Whereas the civil component of Public Law 280 was enacted with a "virtual absence of expression of congressional policy or intent," *Bryan*, 426 U.S. at 381, 96 S.Ct. 2102, in ICWA Congress provided considerable structure, content, and intent. The text and structure of ICWA, coupled with the backdrop against which ICWA was enacted, persuade us that Congress intended Public Law 280 states to exercise jurisdiction over child dependency proceedings and did not intend to differentiate between voluntary and involuntary proceedings for the purposes of Public Law 280.

ICWA references Public Law 280 in two places, both of which indicate that Congress intended Public Law 280 states to have jurisdiction over dependency proceedings in Indian country. First, while § 1911(a) gives tribes in most states exclusive jurisdiction "over any child custody proceeding involving an Indian child, who resides or is domiciled within the reservation of such tribe," Congress limited this tribal jurisdiction "where such jurisdiction is otherwise vested in the State by existing Federal law." In other words, tribes do not have exclusive jurisdiction over child custody proceedings in Public Law 280 states.

Second, Congress expressly incorporated Public Law 280 in § 1918(a):

> Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78) [Public Law 280], or pursuant to any other Federal law, may reassume jurisdiction over child

> custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

Through use of the term "reassume," Congress manifested its awareness that Public Law 280 states would continue to exercise jurisdiction over child custody proceedings, both voluntary and involuntary. In § 1918, Congress provided tribes in Public Law 280 states the opportunity to obtain exclusive jurisdiction by following a detailed procedure. *See* 25 U.S.C. §§ 1918(a), (b); 25 C.F.R. § 13.12. Absent an attempt to follow that protocol, however, Public Law 280 states may exercise jurisdiction over child custody proceedings.

Section 1918(a) would make little sense unless § 1911(a) permits Public Law 280 states to exercise jurisdiction over child custody proceedings. Section 1918(a) provides a mechanism for the tribes to reassume exclusive jurisdiction. But unless Public Law 280 states have jurisdiction, there is nothing for tribes to reassume under § 1918. It would be illogical to give exclusive jurisdiction back to the tribes under § 1918(a) if such jurisdiction were not part of the exception under § 1911(a).

Mary Doe claims that under ICWA, states have jurisdiction over adoptions and voluntary proceedings, but not over involuntary dependency actions. Mary Doe's efforts to create a distinction between "involuntary" and "voluntary"

proceedings in order to put her case outside of California's Public Law 280 jurisdiction are unpersuasive and without statutory support. As an overall proposition, it is important to note that both § 1911(a) and § 1918 reference "child custody proceeding" as a unitary concept and do not separate or distinguish between voluntary and involuntary proceedings.

In addition, "child custody proceeding" is specifically defined by § 1903(1) to include both voluntary and involuntary child custody proceedings:

> (1) "child custody proceeding" shall mean and include—
>
> > (i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
> >
> > (ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

> (iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and
>
> (iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.
>
> Such term shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

25 U.S.C. § 1903(1).

Although the definition encompasses voluntary adoption, which ultimately would result in "termination of parental rights" and an "adoptive placement," the sequence of the definition is, however, clearly aimed at involuntary proceedings. A "foster care placement" is one "wherein the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated." Following such a placement, parental rights may be terminated. In turn, a child would then be placed in a "preadoption placement" and ultimately, although not necessarily, into a permanent "adoptive placement." The

definition of the term "child custody proceeding" definitely encompasses both voluntary and involuntary proceedings and contemplates state participation in dependency proceedings.

The text of ICWA further underscores that Congress distinguished voluntary from involuntary child custody proceedings when it intended the distinction to be meaningful. For instance, §§ 1912 and 1913 established federal standards that apply in involuntary and voluntary child custody proceedings involving Indian children. Section 1912(a) specifically requires state agencies to give notice to an Indian child's parent or custodian and tribe when an *involuntary* proceeding is pending in state court. 25 U.S.C. § 1912(a)("In any *involuntary proceeding* in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, ...") (emphasis added). In addition, § 1913 establishes parental rights in *voluntary* child custody proceedings involving Indian children. 25 U.S.C. § 1913 (entitled "Parental rights; *voluntary* termination") (emphasis added); 25 U.S.C. § 1913(c) (in any *voluntary* proceeding for termination of parental rights, a parent may withdraw consent). Congress made no such distinction between involuntary and voluntary child custody proceedings when it employed its general reference to "child custody proceedings" in §§ 1911(a) and 1918(a).

The maxim that the various provisions of a statute are affected by other parts of the statutory scheme and that "the words of a statute must be read in their context and with a

view to their place in the overall statutory scheme," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (internal quotations and citations omitted), is particularly apt here. When the term "child custody proceedings" is used as it is defined in § 1903 without modification, it refers to child custody proceedings generally, both voluntary and involuntary. Only §§ 1912 and 1913 make a distinction; when Congress wanted to refer to either voluntary or involuntary 8463 proceedings specifically, it so stated. Absent that delineation, the statute does not differentiate between voluntary and involuntary proceedings. *See* §§ 1911(a) and 1918(a).

This understanding of ICWA is also reflected in the regulations promulgated by the Bureau of Indian Affairs following ICWA's enactment. The regulations require tribes attempting to reassume jurisdiction over child custody proceedings pursuant to § 1918 to show the availability of child care services. 25 C.F.R. § 13.12(5). In particular, the child care services were deemed necessary in cases where a "tribal court finds [a child] must be removed from parental custody," *id.*, which confirms that the Bureau of Indian Affairs anticipated tribal reassumption of jurisdiction over involuntary proceedings where Public Law 280 states had assumed jurisdiction.[32]

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32. While Mary Doe points out that the same regulations noted that the jurisdictional status of child custody proceedings was not clear in the late 1970s, this statement in the regulations was limited to the debate over whether Public Law 280 states have exclusive or concurrent jurisdiction over child custody proceedings:

> On some reservations there are disputes concerning whether certain federal statutes have subjected Indian

(Cont'd)

In short, the explicit references to Public Law 280 in ICWA, ICWA's clear definition of child custody proceedings, and the statutory structure of ICWA demonstrate that Congress intended Public Law 280 states to have jurisdiction over Indian child dependency proceedings unless tribes availed themselves of § 1918 in order to obtain exclusive jurisdiction. The effort to impose a dividing line between voluntary and involuntary finds no support in the statute.

The legal landscape that existed when Congress passed ICWA bolsters the conclusion that Public Law 280 states have jurisdiction over child dependency proceedings. When Congress enacted ICWA, states already were exercising their Public Law 280 jurisdiction over child dependency proceedings, a fact we presume Congress knew. *E.g., United States v. Gonzalez-Mendez,* 150 F.3d 1058, 1061 (9th

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(Cont'd)

> child custody proceedings to state jurisdiction or whether any such jurisdiction conferred on a state is exclusive of tribal jurisdiction. Tribes located on those reservations may wish to exercise exclusive jurisdiction or other jurisdiction currently exercised by the state without the necessity of engaging in protracted litigation. The procedures in this part also permit such tribes to secure unquestioned exclusive, concurrent or partial jurisdiction over Indian child custody matters without relinquishing their claim that no Federal statute had ever deprived them of that jurisdiction.

25 C.F.R. § 13.1(b). This question was resolved by our decision in *Native Village of Venetie I,* which held that Public Law 280 states have only concurrent jurisdiction with the tribes over child custody proceedings involving Indian children. 944 F.2d at 559-62.

Cir.1998) ("We presume that Congress enacts statutes with full knowledge of the existing law."). Therefore, it cannot go unnoticed that Congress considered ICWA against the backdrop of mandatory Public Law 280 states like California[33] and non-mandatory states like Washington and Idaho that had specifically asserted Public Law 280 jurisdiction over child dependency proceedings prior to the passage of ICWA.[34] Had Congress wanted to divest Public Law 280 states of this jurisdiction, surely it would have done so on the face of ICWA.

The legislative history of ICWA supports the view that Congress intended Public Law 280 states to retain jurisdiction over all child custody proceedings as defined in ICWA. In fact, the focus of Congress and the Executive Branch on

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33. As a mandatory Public Law 280 state, California did not need specific state legislation to take jurisdiction over Public Law 280 subjects, including child dependency.

34. Wash. Rev.Code § 37.12.010 (1963); Idaho Code § 67-5101 (1963). These statutes did not indicate whether the states thought the criminal or civil component of Public Law 280 provided each state with jurisdiction over involuntary child dependency proceedings. Recently, an Idaho appeals court asserted in dictum that Idaho's child dependency law was prohibitory in nature, and therefore, fell within the state's criminal Public Law 280 jurisdiction. *State v. Marek*, 116 Idaho 580, 777 P.2d 1253, 1255 (1989) ("Idaho does not merely 'regulate'—rather, it prohibits and seeks to eliminate—injury to children. Indeed, the same can be said of the Child Protective Act and the Parent-Child Relationship Termination Act. These statutes do not simply 'regulate' the abuse, neglect or abandonment of children; rather, they seek to prevent and to ameliorate the tragic effects of such conduct.").

the ability of tribes in Public Law 280 states to reassume exclusive jurisdiction over child custody proceedings comports with our conclusion that both branches were particularly concerned with the tribes' ability to handle resource-intensive child custody proceedings. In passing ICWA, Congress recognized that Public Law 280 states should retain, at least initially, jurisdiction over child dependency proceedings until the tribes had the capability to reassume exclusive jurisdiction.

As discussed in § III(B), *supra,* the carve out of Public Law 280 states from ICWA's exclusive tribal jurisdiction was a conscious undertaking on the part of Congress. Indeed, after the Executive Branch brought to the attention of Congress that failure to exclude Public Law 280 states from § 1911(a) would obliterate existing state-court jurisdiction, Congress was quick to respond—both with a letter to the Department of Justice[35] and with amendment of the draft bill.

It is also important to note that throughout the congressional discussions of ICWA, state-initiated dependency proceedings were a focus of the discussion. The conference report that accompanied the passage of ICWA demonstrates Congress's focus on abuses in involuntary child custody proceedings involving Indian children. After summing up the statistical evidence that Indian children were far more likely to be removed from their families and placed

35. Mo.s Udall, Chairman of the Interior and Insular Affairs Committee, advised the Department of Justice that the Committee had, in fact, "amended the bill to meet some of the Department's objections." 124 Cong. Rec. H38103 (daily ed. Oct. 14, 1978) (letter of Rep. Udall).

in foster homes than non-Indian children, the report stated "It is clear then that the Indian child welfare crisis is of massive proportions and that Indian families face vastly greater risks of involuntary separation than are typical of our society as a whole." H.R.Rep. No. 95- 1386, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7532. The report went on to note that "[i]n judging the fitness of a particular family, many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists." H.R.Rep. No. 95-1386, at 10, *reprinted in* 1978 U.S.C.C.A.N. 7530, 7532.

While it is true that Congress also expressed concern with voluntary adoptions both by incorporating voluntary proceedings as part of ICWA and noting voluntary proceedings in the legislative history, the legislative history demonstrates Congress's strong interest in curbing the abuses of state agencies and courts in involuntary proceedings. To conclude that Congress, when it amended § 1911(a) to exclude tribes in Public Law 280 states from exercising exclusive jurisdiction, meant only to refer to voluntary proceedings is thus unreasonable. If Congress intended to differentiate between voluntary and involuntary proceedings in the context of the Public Law 280 proviso in § 1911(a), then Congress would have done so explicitly rather than referring only to "child custody proceedings" generally before inserting the "existing Federal law" proviso. In drafting the definition of "child custody proceedings" to include involuntary proceedings and in structuring the legislation so that tribes in Public Law 280 states could

reassume exclusive jurisdiction over these proceedings, Congress recognized that dependency proceedings fell within the Public Law 280 carve out.

The case law cited in the report accompanying the passage of ICWA also supports this understanding. The report cites three cases involving non-Public Law 280 states. In each instance, the court held that tribes had exclusive jurisdiction. But the cases all suggest that if Public Law 280 had been applicable, the state would have had jurisdiction. H.R.Rep. No. 95-1386, at 21 (July 24, 1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7544 (citing *Wisconsin Potowatomies v. Houston,* 393 F.Supp. 719 (W.D.Mich.1973); *Wakefield v. Little Light,* 276 Md. 333, 347 A.2d 228 (1975); *Matter of Adoption of Buehl, Duckhead v. Anderson,* 87 Wash.2d 649, 555 P.2d 1334 (1976)).[36]

The citation to *Duckhead* is particularly instructive because *Duckhead* references *Comenout v. Burdman,* 84 Wash.2d 192, 525 P.2d 217 (1974). *Duckhead,* 555 P.2d at 1338-39. In *Comenout,* the Washington Supreme Court held that Washington courts have jurisdiction pursuant to Public Law 280 to terminate the parental rights of Indians residing on reservations within the State of Washington through

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36. Although the Washington Supreme Court decided *Duckhead* and Washington is a non-mandatory Public Law 280 state, the case involved a tribe located in Montana, a state that had not assumed Public Law 280 jurisdiction over the Montana tribe involved in the case. *Duckhead,* 555 P.2d 1334, 87 Wash.2d at 657-58 & n. 6. The court emphasized that if Washington's Public Law 280 jurisdiction had applied, the state would have had jurisdiction to terminate the parental rights of Indians. *Id.* at 657.

enforcement of the state's involuntary child dependency law. 525 P.2d at 222.

Mary Doe urges us to apply the Indian canon of construction to resolve the dispute in her favor. *See Ala. Pac. Fisheries Co. v. United States,* 248 U.S. 78, 89, 39 S.Ct. 40, 63 L.Ed. 138 (1918) (ambiguous provisions in a statute passed for the benefit of tribes and their members are interpreted in favor of the Indians). Although we have applied the Indian canons to resolve whether state speeding laws are criminal or regulatory under Public Law 280, that case involved Public Law 280 as a standalone statute and not in connection with ICWA's exception. *See Confederated Tribes of Colville,* 938 F.2d at 149.

The sovereignty considerations that have led courts to apply the canon in interpreting Public Law 280 are not present here because Congress already weighed those considerations in formulating ICWA. There is little doubt that concern for tribal sovereignty and tribal control over Indian children led to ICWA's adoption. *See* 25 U.S.C. § 1901(3) (Indian Child Welfare Act Congressional Findings—"there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children"). After *Bryan,* the carve out from Public Law 280 of regulatory jurisdiction was clear and the scope of Public Law 280 civil jurisdiction was clarified. In the face of this decision, Congress was unambiguous in its effort to exempt Public Law 280 states from ICWA's exclusive jurisdiction and, in doing so, to include all child custody proceedings, both voluntary and involuntary.

But Congress was not unmindful of bridging the sovereignty gap for tribes in Public Law 280 states. With the goal of making tribal sovereignty paramount, Congress established a scheme by which tribes in Public Law 280 states, without the cooperation of state governments, could petition the Secretary of Interior for reassumption of exclusive jurisdiction over child custody proceedings through § 1918. Section 1918 recognized the sovereignty concerns of tribes by permitting Public Law 280 tribes to reassert their sovereign, exclusive authority over child custody proceedings involving children domiciled on the reservation. Given the lack of ambiguity in ICWA and explicit congressional recognition of Indian sovereignty in ICWA, including the reassumption provisions, the Indian canon of construction does not come into play.

Mary Doe's tribe, the Elem Indian Colony, has never petitioned for reassumption of jurisdiction over child custody proceedings. We decline to use the Indian canon of construction to disrupt a congressional scheme that provided a specific process through which tribes in Public Law 280 states could protect their sovereign interests in the future of Indian children. Although our decision does not provide relief to Mary Doe, nothing prevents Mary Doe's tribe from submitting a petition to reassume jurisdiction[37] and nothing prevents Congress from amending ICWA's statutory scheme to recognize the tribal sovereignty interests through a method other than § 1918's reassumption provisions. In a policy area so fraught with risk to the interests of Indian children and

37. Section 1918(d) states that an "[a]ssumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction . . ."

tribes, we do not think the court should substitute its judgment for that of Congress where Congress explicitly provided tribes an opportunity to assert their sovereignty over child custody proceedings.

Finally, we turn to a discussion of California's practice of asserting concurrent jurisdiction under Public Law 280 over dependency proceedings involving Indian children. The practice is best described by a benchguide for California judges prepared by the Law Offices of California Indian Legal Services. *See generally* Mary J. Risling, *California Judges' Benchguide: The Indian Child Welfare Act* (2000), *available at* http:// www.calindian.org/icwa.htm. Because the excerpts are illuminating, we quote at length.

> Under its definition of "child custody proceeding", the [ICWA] specifies the types of custody cases to which it applies and the types of custody cases to which it does not apply. The focus is not on what a proceeding is called, or whether it is a private action or an action brought by a public agency, but on whether the proceeding meets a definition set forth in the Act (25 U.S.C. § 1903(1).) The Act covers *any* temporary placement where the child need not be returned upon demand, and includes placement in a foster home or institution or the home of a guardian or conservator. The Act also covers *any* proceeding resulting in adoption or termination of parental rights. This would generally include juvenile, family court and probate guardianship actions. However, by its terms, the Act does NOT apply

to all custody cases. The Act expressly excepts custody disputes *between parents* in *divorce* (dissolution) proceedings, and placements based on criminal acts. . . .

Benchguide at 1 (emphasis original).

* * *

While California tribes do not yet have primary jurisdiction over custody proceedings, it is important to bear in mind that the Indian child has an interest in his or her tribe that Congress has sought to protect. . . .

Non-exclusive jurisdiction can also arise where a tribe's authority over civil matters has been partially divested by the federal government. Although tribes generally retain exclusive jurisdiction over their internal affairs, in some states, Congress delegated to the states partial jurisdiction over Indian reservations within the states. 28 U.S.C. § 1360. These states are commonly called "P.L. 280 states", and the tribes affected by the statute are called "P.L. 280 tribes". In these states, even if a child is domiciled or resides on the reservation, the state may acquire valid initial jurisdiction. 25 U.S.C. § 1911(a). California is one of these states. [28] U.S.C. § 1360(a). *Tribes from California and other P.L. 280 states may not exercise exclusive jurisdiction over an Indian child custody proceeding under*

> *the ICWA, unless they have reassumed jurisdiction under the Act. Where a tribe has reassumed jurisdiction, and an Indian child residing or domiciled within that tribe's reservation is removed by state authorities, California law requires notice to the tribe no later than the next business day, and transfer of the proceedings to tribal court within 24 hours of receipt of a written notice from the tribe that the child is an Indian. Welf. & Inst. Code § 305.5.*

Benchguide at 64-65 (emphasis added).

In addition, California's dependency statute suggests that California will transfer a child dependency proceeding to a tribe only if the tribe has reassumed exclusive jurisdiction under § 1918:

> **Removal of Indian child from custody of parents by state or local authority; notice to tribe**
>
> (a) Where an Indian child, who resides or is domiciled within a reservation of an Indian tribe that has reassumed exclusive jurisdiction over Indian child custody proceedings pursuant to Section 1918 of Title 25 of the United States Code, has been removed by a state or local authority from the custody of his or her parents or Indian custodian, the state or local authority shall provide notice of the removal to the tribe no later than the next working day following the removal and shall

> provide all relevant documentation to the tribe regarding the removal and the child's identity. If the tribe determines that the child is an Indian child, the state or local authority shall transfer the child custody proceeding to the tribe within 24 hours after receipt of written notice from the tribe of that determination.
>
> (b) As used in this section, the terms "Indian child" and "Indian child custody proceedings" shall be defined as provided in the federal Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

Cal. Welf. & Inst.Code § 305.5.

It is also significant that prior to amendment in 2005, Rule 1439(c)(1) of the California Rules of Court stated: "If the Indian child resides or is domiciled on an Indian reservation that exercises exclusive jurisdiction under the Act over child custody proceedings, the petition under section 300 must be dismissed. At present, no California tribe is authorized under the Act to exercise exclusive jurisdiction." The new rule contains the same substantive provision suggesting that a state court will not transfer a dependency proceeding under § 1911(a) unless the tribe has reassumed jurisdiction: "If the Indian child resides or is domiciled on an Indian reservation that exercises exclusive jurisdiction under the act over child custody proceedings, the petition under section 300 must be dismissed." Cal. Ct. R. § 1439(c)(1).

Appendix A

Consistent with ICWA, California, a mandatory Public Law 280 state, has been exercising at least concurrent jurisdiction over dependency proceedings involving Indian children. With the drop of a hat, Mary Doe would have us undo this statutory and historical framework and immediately vest exclusive jurisdiction in the tribes. Such a result surely would eviscerate the unambiguous Public Law 280 exception in ICWA. From an ultimate perspective of public policy and in furtherance of the goal of tribal sovereignty over the destiny of Indian children, a transition from Public Law 280 jurisdiction to tribal jurisdiction in child custody proceedings may well be appropriate. But we believe this is a judgment for Congress to make, not the courts.

AFFIRMED.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED SEPTEMBER 29, 2003

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 02-3448 MHP

MARY DOE,

Plaintiff,

v.

ARTHUR MANN in his Official Capacity, ROBERT L. CRONE, JR. in his Official Capacity, LAKE COUNTY SUPERIOR COURT JUVENILE DIVISION, MR. D, MRS. D. and DEPARTMENT OF SOCIAL SERVICES of LAKE COUNTY,

Defendants.

OPINION

Plaintiff Mary Doe ("Doe") brings an action against defendants Arthur Mann and Robert L. Crone, Jr. in their official capacity as California Superior Court judges, Lake County Superior Court's Juvenile Division, Mr. and Mrs. D., and the Department of Social Services of Lake County ("DSS"). Doe alleges that the state child custody proceedings involving her daughter, Jane Doe ("Jane"), violated the Indian Child Welfare Act ("ICWA"), 25 U.S.C. § 1901 *et seq.*, the Due Process Clause, and state child custody law. Now before

the court are two separate motions, one brought by Mann, Crone and the Superior Court (collectively "state court defendants") and the other by DSS, to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Mr. and Mrs. D, Jane's adoptive parents, join in both motions. Having considered the arguments presented, and for the reasons set forth below, the court rules as follows.

BACKGROUND[1]

Doe is a member of the Elem Indian Colony in Lake County, California. Her daughter Jane is also eligible for tribal membership. Except for two brief periods, Jane lived on the tribe's reservation. In April 1998, when Jane was five, she began living with Doe's aunt and Doe's brother and his wife. Jane confided to her mother on June 8, 1999, that she had been sexually abused on several occasions by a male cousin. Doe called DSS the next day to request abuse services for her daughter. By the end of the day, DSS had removed Jane from her relatives' home.

On June 14, 1999, DSS initiated a petition under section 300 of the California Welfare and Institutions Code ("WIC"), alleging that Doe inadequately protected and supervised Jane by failing to provide alternate living arrangements when Doe knew or should have known that Jane could be sexually abused. Notice of the hearing and petition was sent to the home of Doe's aunt. Doe did not appear at the hearing.

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1. Unless otherwise specified, facts are taken from plaintiff's complaint.

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Superior Court Judge Mann, who conducted the hearing on the petition, determined that Jane should be placed in DSS custody.

On June 22, 1999, DSS mailed a "Notice of Involuntary Child Custody Proceeding Involving an Indian Child" to a post office box that Doe allegedly did not own and could not access. The hearing concerned the court's jurisdiction over Jane under section 300 of WIC. When Doe did not appear at the hearing, Judge Mann continued the matter to July 26, 1999. Doe again alleges that she did not receive proper notice about the continuance and so was not present. At the hearing on July 26, Judge Mann found that the court had jurisdiction but did not make any findings concerning Jane's status as an Indian child under ICWA.

On August 9, 1999, Doe appeared in court for the first time for a hearing on the appropriate disposition of Jane under WIC section 358. Judge Mann appointed Robert Wiley as Doe's counsel. The hearing was then continued several times until October 4, 1999. Doe alleges that she did not attend the October 4 hearing because she did not receive proper notice from anyone, including her attorney. At the disposition hearing, Judge Mann determined that Jane was a dependent child of the court and requested that DSS place her in foster care. DSS placed Jane with Mr. and Mrs. D., who are not members of the Elem Indian Colony. Doe had requested that Jane be placed with Doe's great aunt, an Elem Indian who had a licensed foster care home. DSS also did not grant foster placement preference to Doe's brother and his wife, who wanted to adopt Jane.

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At a status review hearing on March 27, 2000, Judge Mann ended DSS services designed to reunify Doe and Jane. Doe did not attend this hearing because notice was allegedly sent to the same post office box that she could not access. After several continuances, Judge Mann held a hearing on February 16, 2001 in which he terminated Doe's parental rights under WIC section 366.26. Doe allegedly did not receive proper notice of the hearing and thus did not attend. Two expert witnesses gave conflicting testimony about the best interests of Jane. An ICWA consultant stated that Jane should remain with her mother, while the DSS expert witness recommended placement with Mr. and Mrs. D. Doe alleges that the DSS expert not have knowledge about tribal family customs or the prevailing social and cultural standards of childrearing in the Elem Indian Colony.

On November 17, 2000, the Elem Indian Colony Tribal Council issued a tribal resolution declaring that the tribe's prevailing social and cultural standards, as well as Jane's interests, would best be served by placing her for adoption with Doe's brother and sister-in-law. On September 28, 2001, however, Judge Crone granted the request by Mr. and Mrs. D. to adopt Jane. Judge Mann then dismissed Jane's dependency petition on October 3, 2001.

LEGAL STANDARD

I. *12(b)(1) Motion*

"It is a fundamental precept that federal courts are courts of limited jurisdiction." *Owen Equip. & Erection Co. v. Kroger,* 437 U.S. 365, 374, 98 S.Ct. 2396, 57 L.Ed.2d 274

(1978). When, as here, defendants bring a facial attack to a court's subject matter jurisdiction, the court construes allegations in the complaint in the light most favorable to the plaintiff but does not infer allegations to support jurisdiction. *Trentacosta v. Frontier Pacific Aircraft Industries, Inc.*, 813 F.2d 1553, 1558-59 (9th Cir.1987). The court looks to the complaint and attached documents, as well as to facts that are judicially noticeable or undisputed. *Id.* Plaintiff bears the burden of establishing jurisdiction. *Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir.1996).

II. ***12(b)(6) Motion***

"It is axiomatic that the motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir.1997) (internal quotes omitted). Such dismissal is only proper in "extraordinary" cases. *United States v. Redwood City*, 640 F.2d 963, 966 (9th Cir.1981). The motion will be denied unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Parks Sch. of Bus. Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir.1995); *Fidelity Fin. Corp. v. Federal Home Loan Bank of San Francisco*, 792 F.2d 1432, 1435 (9th Cir.1986), *cert. denied*, 479 U.S. 1064, 107 S.Ct. 949, 93 L.Ed.2d 998 (1987). All material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir.1986).

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DISCUSSION

Doe alleges in her complaint that the California Superior Court lacked jurisdiction over the proceedings because ICWA grants exclusive jurisdiction over such civil actions to Indian tribes. In the alternative, Doe alleges that the state court defendants and DSS violated myriad procedural and substantive requirements in sections 1911, 1912, and 1915 of ICWA. Doe also brings a claim against the state court defendants under section 1983, 42 U.S.C. § 1983, alleging that ineffective assistance of counsel denied Doe the right to due process under the Fourteenth Amendment. Finally, Doe claims that DSS did not properly follow WIC requirements during the proceedings.

In this motion, defendants first contend that this court does not have subject matter jurisdiction because the *Rooker-Feldman* doctrine prohibits inferior federal courts from reviewing state court decisions. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). Secondly, defendants argue that the action is barred by principles of preclusion. Even if the action is not precluded, defendants contend thirdly that the state court had jurisdiction over the underlying child custody proceedings pursuant to the Act of Aug. 15, 1953, Pub.L. No. 83-280, 67 Stat. 588 (codified at 18 U.S.C. § 1163; 28 U.S.C. § 1360(a)), commonly known as Public Law 280. Fourthly, defendants argue that the state proceedings comported with ICWA requirements. Finally, defendants contend that Doe's section 1983 claim is barred

by the one-year statute of limitations, and ask this court to strike the request for attorneys' fees against Superior Court Judge Mann.

I. *Rooker-Feldman Doctrine*

The Ninth Circuit recently explained the *Rooker-Feldman* doctrine as follows: "If claims raised in the federal court action are 'inextricably intertwined' with the state court's decision such that the adjudication of the federal claims would undercut the state ruling or require the district court to interpret the application of state laws or procedural rules, then the federal complaint must be dismissed for lack of subject matter jurisdiction." *Bianchi v. Rylaarsdam*, 334 F.3d 895, 898 (9th Cir.2003). A federal court must focus on the nature of the relief sought. *Id.* at 900. If a disgruntled plaintiff seeks to "undo" a state court's decision, a federal court cannot hear the action even though her claims may not have been fully and fairly litigated in state court. *Id.* at 901.

As an en banc panel of the Ninth Circuit made clear in *In re Gruntz*, 202 F.3d 1074, 1078 (9th Cir.2000), however, the *Rooker-Feldman* doctrine is not required by the Constitution. Instead, the doctrine "arises out of a pair of negative inferences drawn from two statutes": the grant of original jurisdiction over actions "arising under" federal law to district courts, 28 U.S.C. § 1331, and the grant of appellate jurisdiction over decisions by the highest state courts to the U.S. Supreme Court, 28 U.S.C. § 1257. *In re Gruntz*, 202 F.3d at 1078. Congress has explicitly granted federal district courts the power to collaterally review state court decisions through habeas corpus and bankruptcy petitions. *Id.* Indeed, the Supreme Court long ago recognized that Congress,

"because its power over bankruptcy is plenary, may by specific bankruptcy legislation" allow collateral attacks on state court judgments. *Kalb v. Feuerstein,* 308 U.S. 433, 438-39, 60 S.Ct. 343, 84 L.Ed. 370 (1940). Similarly, Congress has plenary power over Indian affairs, U.S. Const. art. I, § 8, cl. 3, a power understood to extend to "the special problems of Indians," *Morton v. Mancari,* 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974).

Because Doe asks this court to reverse a state court judgment, the *Rooker-Feldman* doctrine would normally bar review of the action. Section 1914 of ICWA, however, explicitly provides for review of certain child custody proceedings. "Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title." 25 U.S.C. § 1914. Doe is clearly requesting this court to "invalidate" the state court's termination of her parental rights and placement of Jane in foster care. "Invalidation" by definition requires the court to revisit the state court proceeding and overturn the decision. In addition, by a process of elimination, a "court of competent jurisdiction" must include inferior federal courts, or the provision is meaningless. If the section only referred to state appellate courts, there would be no need for Congress to create this cause of action; Doe already has the right to appeal an adverse decision to California's higher courts. It is highly

unlikely that the provision grants tribal courts the power to invalidate state court judgments.

There are no reported cases addressing the applicability of the *Rooker-Feldman* doctrine to a claim under section 1914 of ICWA. In *Confederated Tribes of the Colville Reservation v. Superior Court,* 945 F.2d 1138, 1141 (9th Cir.1991), this Circuit held that the *Rooker-Feldman* doctrine barred a tribe from seeking a declaration that a tribal court had concurrent jurisdiction over a custody proceeding, when a state court previously declared it had exclusive jurisdiction. The Circuit did not consider section 1914 or its relationship to the *Rooker-Feldman* doctrine; thus, its decision is not necessarily applicable to the action at bar. Moreover, the court emphasized that it was loathe to "untangle this jurisdictional knot" when the parties in the custody proceeding were not before the court and the tribe brought an appeal "not of a final decision, but one of the grounds mentioned by a state court to justify an interlocutory order that did not even dispose of the custody issue at hand." *Id.* None of these "tangles" apply to this action.

Allowing a collateral attack to state court child custody proceedings is in keeping with both federal Indian jurisprudence and the intent of ICWA. In interpreting ICWA, this Circuit has emphasized the " 'unique trust relationship between the United States and the Indians.' " *Native Village of Venetie I.R.A. Council v. Alaska,* 944 F.2d 548, 553 (9th Cir.1991) (quoting *Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 247, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985)). Statutory provisions are to be "construed liberally in favor of the Indians; ambiguous provisions are to be interpreted to

the Indians' benefit." *Id.* Moreover, ICWA "was the product of rising concern" over the states' widespread practice of taking Indian children from their families and placing them in non-Indian homes and institutions. *Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 32, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989). In an opening paragraph of ICWA, Congress declared: "States, exercising their recognized jurisdiction . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). This court finds that section 1914 grants federal courts the power to review state custody proceedings such as those here; therefore, the *Rooker-Feldman* doctrine does not apply to the action at bar.

II. *Preclusion*

Defendants urge this court to accept the reasoning of two Tenth Circuit cases that barred relief based on res judicata and collateral estoppel. In *Kiowa Tribe of Okla. v. Lewis,* 777 F.2d 587, 592 (10th Cir.1985), *cert. denied,* 479 U.S. 872, 107 S.Ct. 247, 93 L.Ed.2d 171 (1986), the Tenth Circuit determined that a tribe could not relitigate the applicability of ICWA in federal court after appealing the state district court's decision to the state supreme court and gaining a full hearing on the matter. In so ruling, the Tenth Circuit found that section 1914 did not act as an implied repeal of the full faith and credit doctrine, 28 U.S.C. § 1738. 777 F.2d at 592. The Tenth Circuit later held that a tribe was barred by collateral estoppel from re-litigating the tribe's exclusive jurisdiction under ICWA, an issue the same parties fully briefed in front of the state district court. *Comanche Indian*

Tribe of Okla. v. Hovis, 53 F.3d 298, 303 (10th Cir.), *cert. denied,* 516 U.S. 916, 116 S.Ct. 306, 133 L.Ed.2d 210 (1995). Once again, the Tenth Circuit found that section 1914 of ICWA was not "an independent ground to relitigate state court decisions. Once the Tribe chose to litigate in State Court, review of the State Court's decision was limited to timely appeal to the state appellate courts and was not 'appealable' in federal district court." *Id.* at 304.

The court is not persuaded that *Kiowa* and *Comanche* should apply to this action. In those cases, the plaintiff tribes had fully litigated the issues in front of a state court, lost, and then tried to have another "bite at the apple" in federal court. In contrast, it appears the issues in this action were never raised in the California Superior Court. For example, Doe claims that the tribe had exclusive jurisdiction over these proceedings, an issue that the state court did not consider. Even Doe's claims that the Superior Court misapplied ICWA's requirements by, for example, providing inadequate notice and not giving full faith and credit to a tribal resolution, were not disputed in the underlying state action. Under section 1914, Congress specifically provided a cause of action to invalidate any state court action that did not meet the requirements of sections 1911, 1912 or 1913. Applying the principles of preclusion to alleged irregularities in the state custody proceedings, when the issues were not fully briefed and adjudicated, does not serve the judicial interest in efficiency or finality.

Beyond citing these cases, neither the state court defendants nor DSS make any effort to explain how the relevant state law elements of res judicata and collateral

estoppel are met in this action. Because defendants have not met their burden, the action is not precluded.

III. *Tribal Jurisdiction under ICWA*

Because Public Law 280 states such as California have jurisdiction over child custody proceedings, defendants contend that plaintiff fails to state a claim for exclusive jurisdiction over the proceedings by the Elem Indian Colony. Resolving this dispute—which is solely a matter of statutory interpretation—involves a complicated foray into the jurisdictional reach of Public Law 280 and Congress's understanding of that reach in ICWA.

Section 1911(a) of ICWA provides that "[a]n Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, *except where such jurisdiction is otherwise vested in the State by existing Federal law.*" 25 U.S.C. § 1911(a) (emphasis added). The primary federal law granting state courts jurisdiction over cases involving Indians is Public Law 280. Section 2 gives state courts in certain states jurisdiction over "criminal offenses committed by or against Indians" and section 4 gives jurisdiction over "civil causes of action between Indians or to which Indians are parties" that "arise in the areas of Indian country" listed in the law. 18 U.S.C. § 1162; 28 U.S.C. § 1360(a). "All Indian country" in California is subject to jurisdiction under section 4. 28 U.S.C. § 1360(a).

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Plaintiff argues that Public Law 280 never granted jurisdiction to state courts for the kinds of state proceedings at issue in this action, namely termination of parental rights, foster care placement and adoptive placement. Surprisingly, in the twenty-five years since ICWA was enacted, no court has ruled on this issue. Defendant DSS claims that this Circuit, in holding that tribal villages and state courts had concurrent jurisdiction over child custody determinations in *Native Village of Venetie,* recognized state court jurisdiction under Public Law 280. The Circuit used broad language to describe jurisdiction under Public Law 280. *See* 944 F.2d at 555 ("For some tribes, the exclusive and referral jurisdiction provisions of sections 1911(a) and (b) became effective automatically following the enactment of [ICWA]. However, tribes located within so-called Public Law 280 states . . . can invoke such jurisdiction only after petitioning the Secretary of the Interior."). *Native Village of Venetie,* however, concerned private adoptions. Noting that "[i]t is not disputed that private adoption cases are included within this [Public Law 280] transfer of civil jurisdiction from the federal government to the states," 944 F.2d at 560, the Circuit did not explicitly address the proceedings at issue here. Thus, this court must conduct its own analysis.

Plaintiff relies on a series of cases narrowly interpreting Public Law 280's grant of civil jurisdiction to include only private civil actions. The courts examine the nature of the law to determine whether it is criminal or civil. Some laws, such as those assessing personal property taxes, are clearly civil laws by which the state seeks to regulate Indians. Thus, in *Bryan v. Itasca County,* 426 U.S. 373, 390, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976), the Court held that Public Law 280

did not grant the state jurisdiction to collect these taxes. The Court reasoned that Public Law 280's civil grant of jurisdiction "seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes." *Id.* at 383, 96 S.Ct. 2102. Thus, the Court found that the "primary intent of section 4 [of Public Law 280] was to grant jurisdiction over private civil litigation involving reservation Indians in state court." *Id.* at 385, 96 S.Ct. 2102.

Plaintiff claims that because the state is a party to the child custody proceedings at issue in this action, it can in no way be viewed as a private civil litigant. Defendants reply that California's child welfare laws should be interpreted as criminal in nature because they prohibit child abuse and neglect. In *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 208, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), the Court adopted a distinction between laws that are "criminal/prohibitory" and "civil/regulatory." Laws that are intended generally "to prohibit certain conduct" are considered criminal and thus fall under state court jurisdiction, while those laws that "generally permit[ ] the conduct at issue, subject to regulation," are civil/regulatory and thus fall outside of state court jurisdiction. *Id.* at 209, 107 S.Ct. 1083. "The shorthand test is whether the conduct at issue violates the State's public policy." *Id.* In holding that restrictions on high stakes bingo are civil/regulatory, the Court interpreted the restrictions in light of the large amount of gambling activity permitted by California. *Id.* at 210, 107 S.Ct. 1083. "*Cabazon* focuses on whether the prohibited

activity is a small subset or facet of a larger, permitted activity . . . or whether all but a small subset of a basic activity is prohibited." *Confederated Tribes of Colville Reservation v. Washington,* 938 F.2d 146, 149 (9th Cir.1991) (finding speeding laws with civil penalties to be civil/regulatory), *cert. denied,* 503 U.S. 997, 112 S.Ct. 1704, 118 L.Ed.2d 412 (1992).

Cabazon concerned a penal law that sanctioned violators with a misdemeanor. In the action at bar, there are no criminal penalties for violations of California law governing child custody proceedings. In *Confederated Tribes,* however, this Circuit examined the nature of the statute even though the traffic infraction at issue was not a criminal offense. Citing *Cabazon,* the *Confederated Tribes* court warned that "in an inquiry such as this we must examine more than the label itself to determine the intent of the State and the nature of the statute." *Id.* at 148.

Nothing in the state welfare laws at issue in the child custody proceedings or the manner in which the state conducts these proceedings indicates that the laws are by nature criminal. The state asserted jurisdiction over Jane under sections 300(b) and (d) of WIC. Section 300(d) gives the juvenile court jurisdiction over a child that "has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in Section 11165.1 of the Penal Code, by his or her parent or guardian or a member of his or her household, or the parent or guardian has failed to adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse." Cal. Welf. &

Inst.Code § 300(d). As this section makes clear, child dependency proceedings stemming from sexual abuse rely on the criminal definition but are ultimately separate from criminal actions brought by the state under its penal laws. Further sections describe the responsibilities of the court in terminating parental rights, placing a dependent child in foster care, and accepting adoption petitions. The purpose of these provisions is to "provide maximum safety and protection for children," and the "focus shall be on the preservation of the family as well as the safety, protection, and physical and emotional well-being of the child." *Id.* § 300.2. Nowhere does the statute cite as its purpose punishing the parent.

Defendants insist, however, that the conduct at issue should be considered criminal/prohibitory under *Cabazon* since the state prohibits parents from sexually abusing or neglecting their children by taking their children away. If this court were to focus on the narrow conduct of child abuse, the conduct could conceivably fall under the criminal/prohibitory category. Certainly child abuse violates California's public policy, as is clear from both the child welfare laws and penal laws. But *Cabazon* requires this court to inquire whether the prohibition is only one part of a larger regulatory scheme of permitted activity. Plaintiff argues that the state provision allowing a juvenile court to take jurisdiction over a sexually abused child should be seen in the context of the generally permitted activity of parenting. In fact, section 300(j) of WIC states that "nothing in this section [is intended to] disrupt the family unnecessarily or intrude inappropriately into family life, prohibit the use of reasonable methods of parental discipline, or prescribe a

particular method of parenting." Cal. Welf. & Inst.Code § 300(j). Seen in this light, the state is regulating parenting when a parent's activity harms a child's well-being.

California case law supports plaintiff's interpretation. California courts have consistently held that state child dependency proceedings in juvenile court are civil actions designed to protect the child, not reprove the parent for violating a prohibition. "The central purpose of dependency proceedings is to protect the welfare and best interests of the child, not to punish the parent." *In re Walter E.*, 13 Cal.App.4th 125, 137-38, 17 Cal.Rptr.2d 386 (1992). *See also In re Malinda S.*, 51 Cal.3d 368, 384, 272 Cal.Rptr. 787, 795 P.2d 1244 (1990) (superseded by statute on other grounds); *Collins v. Superior Court*, 74 Cal.App.3d 47, 52-53, 141 Cal.Rptr. 273 (1977). Parents have limited rights against DSS in the proceedings and cannot invoke the Fourth Amendment exclusionary rule or claim ineffective assistance of counsel on appeal. *In re Malinda S.*, 51 Cal.3d at 384-85, 272 Cal.Rptr. 787, 795 P.2d 1244. Even if there were some uncertainty as to the nature of these proceedings under California law, this uncertainty must be resolved in favor of Indian sovereignty. *Blackfeet Tribe*, 471 U.S. at 766, 105 S.Ct. 2399; *Confederated Tribes*, 938 F.2d at 149.

Although plaintiff has made a convincing argument based on Public Law 280 case law, her interpretation must ultimately fail because granting tribes exclusive jurisdiction over child custody proceedings would gravely undermine the ICWA statutory scheme, making its provisions illogical. By plaintiff's argument, state courts in Public Law 280 states would only have jurisdiction over private child custody

proceedings regarding children living on a reservation, and over those "involuntary" child custody proceedings concerning Indian children who live off-reservation, because the parent, custodian or tribe did not petition for the proceedings to be transferred to the tribe, the tribal court did not accept jurisdiction, or the state court found "good cause" not to transfer the proceedings. 25 U.S.C. § 1911(a)-(b).

Plaintiff contends that such a limited state role is in line with Congress's intent to transfer the rest of the proceedings to tribes so they could apply their own culturally appropriate standards. Such an interpretation ignores the relevant legislative history. Congress appears to have drafted the exception in section 1911(a) in response to concerns voiced by the Departments of Interior and Justice about the place of Public Law 280 in the jurisdictional scheme. Thus, in a letter to the House committee, the Assistant Secretary of Interior stated: "We believe that reservations located in States subject to Public Law 83-280 should be specifically excluded from section 101(a) [1911(a)]. . . ." Indian Child Welfare Act of 1978, H.R.Rep. No. 95- 1386, at 32 (July 24, 1978), *reprinted in* 1978 U.S.C.C.A.N. 7530 *et seq.* Patricia Wald, then Assistant Attorney General, wrote that a House draft of section 1911(a), "if read literally, would appear to displace any existing State court jurisdiction over these matters based on Public Law 83-280. We doubt that is the intent of the draft because, inter alia, there may not be in existence tribal courts to assume such State-court jurisdiction as would apparently be obliterated by this provision." *Id.* at 40.

Section 1918 of ICWA allows tribes subject to state jurisdiction under Public Law 280 to "reassume jurisdiction

over child custody proceedings." 25 U.S.C. § 1918(a). In order to reassume jurisdiction, tribes must submit a "suitable plan" to the Secretary of Interior to show that reassumption is feasible. *Id.* The Secretary can consider the tribe's ability to identify its members, the size and population of the reservation, and the existence of other tribes in the area. *Id.* § (b)(1). Criteria include whether "[t]he constitution or other governing document, if any, of the petitioning tribe or tribes authorizes the tribal governing body or bodies to exercise jurisdiction over Indian child custody matters," the existence of a tribal court that "will be able to exercise jurisdiction over Indian child custody matters," and available "[c]hild care services sufficient to meet the needs of most children the tribal court finds must be removed from parental custody." 25 C.F.R. § 13.12.

Requiring tribes to petition the Secretary of Interior for reassumption over the few child custody proceedings that could be understood as private civil actions, such as private adoptions, is illogical if the tribes already have jurisdiction over most of the more difficult and resource-intensive involuntary proceedings, such as parental termination and foster care placement. Plaintiff contends that judicial interpretation of Public Law 280 was unsettled at the time Congress considered ICWA; therefore, Congress intended section 1918 to be a fail-safe provision for tribes to reassume jurisdiction if the courts found that Public Law 280 did apply to child custody proceedings. The court finds this argument unreasonable and without textual support. It seems much more likely that Congress assumed Public Law 280 did apply to a broad range of child custody proceedings and wanted to

offer tribes who had the necessary structures the opportunity for self-governance.

Plaintiff does not contend that an Elem Indian Colony tribal court or other quasi-judicial body exists to hear this case. Although section 1911(a) of ICWA grants exclusive jurisdiction to tribes, not to tribal courts, Congress was clearly concerned about the feasibility of tribal jurisdiction in section 1918, a concern echoed in the regulations governing reassumption. As Wald noted in her letter to the House committee, some tribes in Public Law 280 states may not have the administrative or judicial structures to hear child custody proceedings. Congress passed Public Law 280 because it was concerned about lawlessness on reservations and the inability of tribes to adequately enforce the laws. Although most courts have not addressed the adequacy of tribal institutions in interpreting the reach of Public Law 280, this Circuit did note the existence of laws and institutions in rejecting the state's argument for uniformity of speeding laws in *Confederated Tribes*, 938 F.2d at 149 n. 2. Rather than go down this road, the court will defer to the process Congress created.[2]

Therefore, unless plaintiff can demonstrate that the Elem Indian Colony has reassumed jurisdiction over child custody proceedings pursuant to section 1918 of ICWA, the court

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2. For these reasons, the court finds it troubling that the Elem Indian Colony did not intercede in this action from the outset, including while the issue was in state court. After the oral argument on this motion, the Colony filed a motion to intervene; this motion is calendared for October 6, 2003.

finds as a matter of law that plaintiff cannot state a claim for exclusive jurisdiction by the tribe.

IV. *ICWA Procedural Requirements*

State court defendants next contend that the Superior Court did not violate any of the ICWA requirements in its proceedings.[3] They first argue, relying on *In re Laura F.*, 83 Cal.App.4th 583, 99 Cal.Rptr.2d 859 (2000), that a state court need not accept the recommendation of a tribal resolution to give it full faith and credit. Defendants misunderstand the nature of a motion to dismiss. Section 1911(d) of ICWA provides that every state "shall give full faith and credit to the public acts, records and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity." 25 U.S.C. § 1911(d). It is not beyond doubt that plaintiff can set forth facts showing the Superior Court failed to give credit to the tribal resolution. Such a possibility is all that is required. Thus, the court finds that plaintiff has stated a claim under section 1911(d).

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3. The state court defendants also argue that plaintiff has not alleged sufficient facts to support her claim under section 1920 of ICWA. Section 1920 provides that a court "shall forthwith return the child to his parent" if a petitioner in a child custody proceeding "improperly removed the child from custody of the parent" or "has improperly retained custody after a visit or other temporary relinquishment of custody." 25 U.S.C. § 1920. Among other allegations, plaintiff states that DSS failed to make active efforts to provide remedial services and rehabilitative programs and failed to show these efforts were unsuccessful. Compl. ¶ 64. Taken as true, these allegations support a claim under section 1920.

Second, the state court defendants contend that section 1912(b) of ICWA, which provides an indigent parent or Indian custodian "the right to court-appointed counsel in any removal, placement, or termination proceeding," 25 U.S.C. § 1912(b), only requires a court to appoint counsel. Since the Superior Court appointed Wiley as counsel for Doe, plaintiff cannot state a claim. This court has found no federal case law interpreting the scope of this right.[4] Generally, there is no constitutional right to effective counsel for indigent parties who are represented by court-appointed attorneys in civil cases. *Nicholson v. Rushen,* 767 F.2d 1426, 1427 (9th Cir.1985). Here, however, Congress has specifically mandated a right to counsel for indigent Indians. In light of Congress's concern that state judicial bodies have "failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families," 25 U.S.C. § 1901(5), the right to counsel must mean more than just the presence of a warm body. If the right is "construed liberally in favor of the Indians" and ambiguities are "interpreted to the Indians' benefit," *Native Village of Venetie,* 944 F.2d at 553, indigent Indians such as Doe are entitled to counsel who can effectively represent their interests. Plaintiff alleges that

4. In Oregon, an appellate court found the standards of performance for court-appointed counsel under ICWA to be the same as those under a state statute granting counsel to indigent parents in termination hearings. *State ex. rel Juvenile Dep't v. Charles,* 106 Or.App. 637, 810 P.2d 393, 395 (1991). In *V.F. v. State,* 666 P.2d 42, 45 (Alaska 1983), the Alaska Supreme Court noted that a right to effective assistance of counsel may be implied from ICWA but ultimately rested the right in the due process clause of the state constitution.

Wiley never met with her after the initial appointment, did not discuss the substantive issues of the case with her and did not consult her about her wishes for Jane. These allegations are sufficient to state a claim for violation of section 1912(b).

Third, the state court defendants contend that plaintiff cannot state a claim for violations of section 1915 of ICWA because there is no statutory cause of action. Plaintiff alleges that defendants failed to give Jane's extended family and other members of the Elem Indian Colony preference in pre-adoption and adoption placement, give effect to a tribal resolution that proposed the least restrictive setting appropriate to the needs of Jane, and apply the prevailing social and cultural standards of the Elem Indian Colony. *See* 25 U.S.C. § 1915(a)-(d). Section 1914 explicitly provides a cause of action to "invalidate" foster care placement or termination of parental rights, but only "upon a showing that such action violated any provision of sections 1911, 1912, and 1913."

Defendants rely on *Navajo Nation v. Superior Court,* 47 F.Supp.2d 1233 (E.D.Wash.1999), *aff'd on other grounds,* 333 F.3d 1041 (9th Cir.2003), in which the court concluded there is no implied right of action for violations of section 1915. In deciding this issue, a court must primarily consider "whether Congress intended to create the private right asserted." *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 15-16, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979). This court agrees with the analysis in *Navajo Nation.* There is no evidence in the text of section 1915, the structure of ICWA or the legislative history that Congress intended to

create a cause of action for such violations. In specifically allowing plaintiffs to seek invalidation of a state court's actions based on sections 1911, 1912 and 1913, Congress showed it "knew how to [create a remedy] and did so expressly." *Touche Ross & Co. v. Redington,* 442 U.S. 560, 572, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979).

Plaintiff asserts that the Ninth Circuit's reasoning in *Native Village of Venetie* counsels in favor of implying rights of action under ICWA. In *Native Village of Venetie,* the Circuit held there is an implied right of action in section 1911(d) for a tribe and adoptive parents to challenge the state's failure to give full faith and credit to the tribal court's adoption decrees. 944 F.2d at 554. The plaintiffs in *Native Village of Venetie* could not rely on section 1914, as the action was not "for foster care placement or termination of parental rights." 25 U.S.C. § 1914. In finding "no reason that Congress would not have intended to give Indian tribes access to federal courts to determine their rights and obligations under [ICWA]," the Circuit warned against "impos[ing] upon Indian law doctrines from other fields of law;" instead, statutes involving Indians should be liberally construed for the benefit of Indians. 944 F.2d at 553.

Native Village of Venetie does not stand for the proposition that a right of action may be implied under any provision of ICWA.[5] Section 1914 specifically gives a cause

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5. In *Navajo Nation,* the court interpreted plaintiff's cause of action in *Native Village of Venetie* as one under section 1983, 42 U.S.C. § 1983. *Navajo Nation,* 47 F.Supp.2d at 1243. This court finds no support for such an interpretation in *Native Village of Venetie.*

of action for invalidation of the underlying proceedings in this action—foster care placement and termination of parental rights. In contrast, the plaintiffs in *Native Village of Venetie* had no remedy to challenge the underlying proceedings unless the Circuit implied one. While this court is mindful that ambiguities in ICWA should be interpreted to benefit Indians, it seems clear from the text of section 1914 that Congress intended to provide a cause of action only for violations of three ICWA sections. Moreover, "the principles of federalism and comity that underlie the *Rooker-Feldman* doctrine," *Bianchi,* 334 F.3d at 902, weigh against implying a remedy where no affirmative evidence is present. It is entirely possible that Congress did not want federal courts to entangle themselves in questions about placement preferences. Thus, Doe has failed to state a claim for violations of section 1915.

V. *Section 1983 Claim*

Finally, both defendants contend that Doe's section 1983 claim for ineffective assistance of counsel is barred by the statute of limitations. The statute of limitations for this section 1983 claim is one year. *See De Anza Props. X, Ltd. v. County of Santa Cruz,* 936 F.2d 1084, 1085 (9th Cir.1991).[6]

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6. On January 1, 2003, the California legislature added section 335.1 to the California Code of Civil Procedure. Section 335.1 extends the statute of limitations to two years for actions involving "assault, battery or injury to, or for the death of, an individual caused by the wrongful act or neglect of another." *See* Senate Bill No. 688. The terms of section 335.1 make plain that this change in statute of limitations does not apply retroactively, *see Krusesky v. Baugh,* 138 Cal.App.3d 562, 566, 188 Cal.Rptr. 57 (Cal.App.1982), so a one-year statute of limitations term applies here.

Doe filed this complaint on July 18, 2002. Doe's parental rights were terminated on February 16, 2001. Doe had sixty days to file an appeal of that judgment, Cal. Rule of Court 39.1(f), but the court did not relieve Wiley of his duties until September 4, 2001. In fact, Wiley appeared at a permanency planning review hearing on August 20, 2001. In such a hearing, the court assesses whether the permanent plan for adoption or legal guardianship of the child is proceeding "as expeditiously as possible." Cal. Welf. & Inst.Code § 366.3(a). It appears, however, that Doe had no standing at the review hearing. *See id.* ("Following a termination of parental rights the parent or parents shall not be a party to, or receive notice of, any subsequent proceedings regarding the child."). As Doe may be able to put forth facts concerning Wiley's representation at the August 20, 2001 hearing that would entitle her to relief, however, she has stated a section 1983 claim.[7]

Judicial officers are not held liable for attorneys' fees under section 1988 unless the action was "in excess of such officer's jurisdiction." 42 U.S.C. § 1988(b). As it appears that plaintiff's request for attorney's fees is based entirely on her section 1983 claim for ineffective assistance of counsel, and plaintiff has not alleged how Judge Mann acted in excess of his jurisdiction in appointing Wiley, Doe's request for attorney's fees from Judge Mann is stricken.

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7. DSS also argues that Doe lacks standing to bring any action concerning proceedings that occurred after her parental rights were terminated. As this court has already determined that plaintiff cannot bring a claim based on section 1915 of ICWA, the court need not address this argument.

Appendix B

CONCLUSION

For the foregoing reasons, the court dismisses plaintiff's first claim for relief unless plaintiff provides evidence within thirty days that the Elem Indian Colony reassumed jurisdiction over child custody proceedings pursuant to ICWA section 1918. The court also dismisses those portions of plaintiff's second claim that allege violations of ICWA section 1915. Plaintiff's request for attorney's fees against Judge Mann is stricken.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED SEPTEMBER 19, 2005

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-15477

D.C. No. CV-02-03448-MHP
Northern District of California,
San Francisco

MARY DOE,

Plaintiff - Appellant,

v.

ARTHUR MANN, in his official capacity; ROBERT L. CRONE, JR., in his official capacity; LAKE COUNTY SUPERIOR COURT; DEPARTMENT OF SOCIAL SERVICES, LAKE COUNTY; D., Mrs.; D., Mr.,

Defendants - Appellees.

ORDER

Before: TROTT and McKEOWN, Circuit Judges, and SHADUR,* Senior Judge.

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* The Honorable Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

Appendix C

Judge McKeown votes to deny the petition for rehearing en banc. Judges Trott and Shadur recommend denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

No. 05-815

In The
Supreme Court of the United States

MARY DOE,

Petitioner,

v.

ARTHUR MANN, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE SUPERIOR COURT RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Public Law 280 ("PL-280"), 18 U.S.C. § 1162 and 28 U.S.C. § 1360, and the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-1963, authorized the exercise of concurrent jurisdiction by the Superior Court of Lake County, California, over a child custody proceeding involving Jane Doe, an Indian child alleged to reside on the Elem Indian reservation.

PARTIES TO THE PROCEEDINGS

The petitioner (plaintiff below) is Mary Doe. The respondents (defendants below) are: the honorable Arthur Mann, in his official capacity; the honorable Robert L. Crone, Jr., in his official capacity; the Lake County Superior Court; the Department of Social Services, Lake County; Mr. D.; Mrs. D.; and Jane Doe.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-70a) is reported at 415 F.3d 1038. The District Court's opinion (Pet. App. 71a-97a) is reported at 285 F. Supp. 2d 1229.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 2005. (Pet. App. 1a.) The court denied a petition for rehearing on September 19, 2005. (Pet. App. 98a-99a.) The petition for a writ of certiorari was filed on December 19, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-1963, provides in relevant part:

> **§ 1901. Congressional findings**
>
> Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds –
>
> (1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes [note omitted]" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;
>
> (2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has

assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

§ 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

§ 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term –

(1) "child custody proceeding" shall mean and include –

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

* * *

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an

Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

* * *

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

* * *

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a